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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

NELSON L. ARD, *Plaintiff in Error*, *vs.* ALEXANDER BRANDON.	*No.* 141.
NELSON L. ARD, *Plaintiff in Error*, *vs.* C. H. PRATT	*No.* 142.
MARY E. WOOD, *Plaintiff in Error*, *vs.* J. M. BEACH.	*No.* 143.
WILLIAM MADDOX, *Plaintiff in Error*, *vs.* NELSON BURNHAM.	*No.* 144.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF AND ARGUMENT FOR THE PLAINTIFFS IN ERROR.

WILLIAM LAWRENCE, OF OHIO,
Attorney for Plaintiffs in Error.

November, 1894.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

NELSON L. ARD
vs.
ALEXANDER BRANDON. } *No.* 141.

Error to the Supreme Court of Kansas. (43 *Kansas Rep.*, 425.) *Land in controversy N.* ½ *N. E.* ¼ *Sec.* 11, *T.* 26, *R.* 20.

Ard claims under both homestead and pre-emption settlement July 14, 1866, with continuous claim and possession since. (Record pp. 5–7.)

Brandon claims under patent issued by *the Governor of Kansas*, May 19, 1873, to the Missouri, Kansas and Texas Railway Co. on indemnity list of lands approved by the Secretary of the Interior April 10, 1873. (Record pp. 3–4. See Senate Ex. Doc. No. 194, 1st Sess., 50th Cong., Part 2, p. 132.)

N. L. ARD
vs.
C. H. PRATT. } *No.* 142.

Error to Kansas Supreme Court. (43 *Kansas Rep.*, 419.) *Land in controversy W.* ½ *S. E.* ¼ *Sec.* 2, *T.* 26, *R.* 20.

Ard claims under BOTH *homestead* and *pre-emption* settlement July 14, 1866, with continuous possession and claim since. (Record p. 13.)

Pratt claims under patent OF UNITED STATES to the M., K. & T. Ry. Co. November 3, 1873, under Act of July 26, 1866, on *indemnity* selection, as the patent inaccurately says, April 14, 1873. (Record, 4.) (See Senate Ex. Doc. No. 194, 50th Congress, 1st session, Part 1, p. 78.)

MARY E. WOOD
vs.
J. M. BEACH. } *No.* 143.

Error to Kansas Supreme Court. (43 *Kansas Rep.—decided on authority of Burnham* vs. *Starkey*, 41 *Kansas*, 604.) *Land in controversy N. E.* $\frac{1}{4}$ *Sec.* 1, *T.* 26, *R.* 20.

Wood claims by both homestead and pre-emption settlement of her husband, *June*, 1870, who thereafter occupied, and died December 24, 1886, and continuous possession and claim of his widow and family since. (Record, 10–11.)

Beach claims under patent by the *Governor of Kansas*, May 19, 1873, to the M., K. & T. Ry. Co. (Record, 3) on an indemnity selection approved April 10, 1873. (Record, 4, 17.) (See Senate Ex. Doc. 194, 50th Congress, 1st Sess., Part 2, p. 132.)

WILLIAM MADDOX
vs.
NELSON BURNHAM. } *No.* 144.

Error to Kansas Supreme Court. (43 *Kansas—decided on authority of Burnham* vs. *Starkey*, 41 *Kansas*, 604.) *Land in dispute S. W.* $\frac{1}{4}$ *Sec.* 24, *T.* 25, *R.* 20.

Maddox claims under possession taken October 20,

1866, to make homestead entry with continuous claim and possession since. (Record, 4–5, 7–13.)

Burnham claims under patent November 3, 1873, by United States to the M., K. & T. Ry. Co. under Act July 26, 1866, on *indemnity selection*, as the patent inaccurately says, April 14, 1873. (Record, 6.)

These cases were decided by the Supreme Court of Kansas, January Term, 1890, and *before* the decision of October 19, 1891, of M., K. & T. Ry. Co. *vs.* U. S., 141 U. S., 385.

MOTION FOR CONTINUANCE—CONDITIONAL.

And now come the plaintiffs in the above-entitled actions, by their attorney, and move the Court that in case it shall be found that the ultimate rights of the plaintiffs, in said cases cannot be properly secured, that said cases be continued to await the final decision of the case of the United States *against* the Missouri, Kansas and Texas Railway Co. and others, *including the plaintiffs*, now pending in the Circuit Court of the United States for the District of Kansas, on mandate for further proceedings under the decision of this Court in the same case October 19, 1891 (141 U. S. Rep., 385), for the following reasons:

1. The title to land claimed by Ard in said section 2 and Maddox in said section 24 is involved in said case, in which they are parties, and in which the United States claims that the patents to said lands should be cancelled, because of the pre-emption settlements and the continuous possession thereunder of said parties and their *rights*, are saved to them by Act of March 3, 1887 (24 Stat., 556); Act of April 21, 1876 (19 Stat., 35); Act of May 14, 1880 (21 Stat., 140); Act of June 15, 1880

(21 Stat., 237); Act of July 26, 1866 (Sec. 4, 117 U. S., 228); (M. K. & T. Co. *vs.* Noyes, 25 Kas., 340).

II. As to lands claimed by Ard in section 11 and Wood in section 1, the opinion in M., K. & T. Ry. Co. *vs.* U. S., October 19, 1891, in principle holds the patents void.

III. The original bill in the case of U. S. *vs.* M., K. & T. Ry. Co. and others, 141 U. S., 385, involving the title to *all* said lands, was filed November 19, 1886, and was pending when and ever since said actions were commenced in the State Courts, yet the Supreme Court of Kansas refused (Record, 24) to await a decision in the prior case in the U. S. Court.

IV. For reasons stated in letter September 13, 1894, of Hon. W. C. Perry, U. S. Attorney for District of Kansas, on file, which in principle applies to all four cases. See APPENDIX A hereto.

V. The rights of these settlers remain undetermined in the General Land Office, awaiting the decree of the Circuit Court in order that the Secretary of the Interior may, after decree in Circuit Court and under the acts mentioned, fix time to receive evidence for settlers.

(See letters Commissioner of General Land Office, May 4, 1886, July 6, 1886, and February 17, 1893, on file. APPENDIX *hereto*, *B*, *C*, *D*.) But such rights of settlers cannot be passed on by the General Land Office until after decree canceling patents.

In Wisconsin Central R. R. Co. *vs.* Stinka, Secretary Lamar so decided, January 25, 1886, under the act of April 21, 1876: Vol. 4, Interior Dept., Land Decisions, 344. (See 2 Op. Atty. Genl., 41; 5 Op., 7; Streeter *vs.* M., K. & T. R. R. Co. February 7, 1878, Schurz, Secy. Int., Rep., 1878, Part 1, p. 63; Rep. Com. Gen'l Land Office, 1878. As to Act March 3, 1887, see Opinion Atty. Gen'l, November, 1887, 19 Opinions.)

VI. The *affirmance* by this Court of the judgment of the Supreme Court of Kansas would not finally settle any ultimate question of title,

In the case of Donovan (8 Land Dec., 382), April, 1889, it was held that:

"a judicial decree awarding possession to a purchaser [of land from a railroad company], as against the settler, is not such an adjudication as will preclude the [Interior] Department from taking jurisdiction under said act"

of March 3, 1887, to reinstate a settler in his rights.

VII. For other reasons shown, as the Court may direct.

WILLIAM LAWRENCE,
Attorney for Plaintiffs in Error.

November, 1895.

MATERIAL FACTS.

These are all actions, under the Civil Code Practice act of Kansas, in the nature of ejectment, commenced in the proper courts of that State by defendants in error respectively, against the several plaintiffs in error, to recover specified tracts of land in Allen County, Kansas, EAST of the line of road of the Leavenworth, Lawrence and Galveston Railroad Company, and within the common ten- and twenty-mile overlapping indemnity lands of that road and the road of the Missouri, Kansas and Texas Railway Company, formerly known as the Union Pacific Railroad Company—Southern Branch. The State Court rendered judgments in favor of the plaintiffs in ejectment. The Supreme Court affirmed these judgments and the cases are now in this Court on error.

The printed records are brief, and present the material facts. The defendants in error—plaintiffs in ejectment

—all claim under patents issued to the Missouri, Kansas and Texas Railway Company, under railroad land grant acts of Congress.

AS TO ARD AND MADDOX LAND IN EVEN-NUMBERED SECTIONS.

The patents under which Pratt and Burnham claim were issued by the United States to the Missouri, Kansas and Texas Railway Company, November 3, 1873, under the Railroad Land Grant Act of Congress of July 26, 1866 (14 Stat., 289), for indemnity land on an indemnity selection, approved April 14, 1873. (See Record, Ard *vs.* Pratt, pp. 4–5. Record, Maddox *vs.* Burnham, pp. 5–6. See indemnity list, Senate Ex. Doc. No. 194, 50th Congress, 1st Session, Part 1, p. 5; part 2, p. 147).

Ard claims as against Pratt, under both a homestead and pre-emption entry, initiated July 14, 1866, with continuous claim and possession since. (Record, Ard *vs.* Pratt, pp. 9–14. Ard's claim *antedates* both the granting act and the indemnity selection.

Maddox claims as against Burnham, under a homestead application to the proper local land office, with possession taken October 20, 1866, and continued ever since. (Record, Maddox *vs.* Burnham, pp. 4–5, 7–13.)

The claim of Maddox *antedates* the indemnity selection.

On behalf of Ard and Maddox, it is claimed that their settlement rights are protected by their *priority*, and especially by the Acts of Congress of April 21, 1876 (19 Stat., 35); May 14, 1880 (21 Stat., 140); June 15, 1880 (21 Stat., 237), and March 3, 1887.

AS TO LANDS OF ARD AND WOOD IN ODD-NUMBERED SECTIONS.

Brandon and Wood claim title under the Missouri,

Kansas and Texas Railway Company, which claims title under a patent, May 19, 1873, issued by the GOVERNOR of Kansas on an *indemnity* selection for that Company, approved April 10, 1873. (Record, Ard *vs.* Brandon patent, pp. 3–4. Record, Wood *vs.* Beach patent, pp. 3–4. See U. S. Senate Ex. Doc. No. 194, 1st Sess., 50th Cong., Part 2, p. 132.)

Ard claims under homestead and pre-emption settlement right, initiated July 14 1866, with continuous possession and claim since. (Record 9–7.) Wood claims under a homestead settlement right, initiated June, 1870, with continuous possession and claim since. (Record, pp. 10–11.) The *settler's rights* are protected by priority of settlement and by acts of Congress of 1876, 1880 and 1887 referred to above.

If this Court shall hold that the rights of the settlers in all four of these cases are protected, so as to defeat the ejectment suits against them, then the judgments of the Supreme Court of Kansas will be reversed. It will then not be *absolutely* necessary for the Court to pass on questions relative to the *validity* of the Governor's patents, nor on the *other questions* presented in the case, which are important here and more so on the original and amended bills in the case of the United States *vs.* the M., K. & T. Ry. Co., and others pending in the Circuit Court of the United States under mandate from the decree of the Supreme Court in that case reported in 141 U. S., 358.

The original and first amended bill on which that degree was made, included the lands now in controversy. A second amended bill has been since filed in 1892 in the Circuit Court, including *other lands* as to which other questions herein presented will arise for decision.

ADDITIONAL FACTS.

The Land Grant Act of July 26, 1866 (14 Stat., 289), EXPRESSLY NAMES the Union Pacific R. R. Co., S. B. (now Missouri, Kansas and Texas Railway Co.), as the *beneficiary in that act*, with a land grant in place and *indemnity lands* "from the public lands of the United States"—that is, in *both odd* and *even* numbered sections. THIS COMPANY was *itself* required to make a road from near Fort Riley to the southern line of Kansas.

The *selections* of *even-numbered sections* were *all made*, and patents *all* issued to this company as shown on their face by virtue of the Act of July 26, 1866. (Record, Ard *vs.* Pratt, p. 4, patent. Record, Maddox *vs.* Brandon, p. 6, patent; copy of *all patents*, Senate Ex. Doc., No. 194, 50th Congress, 1st session, Part 1, p. 4, and Part 2, pp. 106–113; copy of patents. Record in case U. S. *vs.* M., K. & T. Ry. Co., 141 U. S., 358, pp. 20–31; copy of all lists of indemnity selections in both *even* and *odd* sections. Senate Ex. Doc. No. 194, 50th Congress, 1st session, Part 1, p. 5, and Part 2, pp. 114–166.) The *even* sections including the lands of Ard and Maddox were selected as indemnity under the act of July 26, 1866, in *list approved* October 16, 1873. (Senate Ex. Doc. No. 194, 50th Congress, 1st session, Part 2, p. 147.)

Thus the company claims *even* sections ONLY under the Act of 1866, and for these the patents were issued by the *United States*, and not by the *Governor of Kansas*.

AS TO INDEMNITY ODD-NUMBERED SECTIONS.

The Act of July 26, 1866, having *expressly* named the M., K. & T. Co. as beneficiary, and its indemnity *even* sections having been selected under *that* act, its

sole right to *odd* sections could accrue only under *that* same act. No matter what rights it might *claim*—if any—under any other company, they could only *date* from the Act of 1866 *and from their selection under that act.*

The *date* may not be material now, because the settler's rights here *all accrued prior* to the indemnity selections.

The patent for the *odd*-section lands now in controversy was issued May 19, 1873, and professes to be authorized by the Act of Congress of March 3, 1863 (12 Stat., 772) and the Kansas act, accepting it, of February 9, 1864. (Record, Wood *vs.* Beach, pp. 3–4; Record, Ard *vs.* Brandon, pp. 3–4.)

The indemnity selection professes to have been made as under the Act of 1863 ALONE, as appears from the so-called patent—the *only*, but insufficient, evidence of selection.

(As to indemnity selection for these lands see Senate Ex. Doc. No. 194, 50th Cong., 1st Sess., Part 1, p. 5; Part 2, p. 132.)

The *patent* recites that the indemnity is earned under the Act of 1863, because the M., K. & T. Co. had constructed a road "from Junction City [not Fort Riley] to the southern boundary of the State of Kansas," and hence under indemnity selection of April 10, 1873, as claimed, "is entitled under the provisions of the Act of Congress of March 3, 1863, etc., . . . to the lands."

There is *nothing* in the record showing *how* the M., K. & T. Ry. Co. could acquire any rights under the Act of 1863. *Congress* never assented to any transfer of any rights under the Act of 1863 to the M., K. & T. Co. Its right to indemnity land from the United States was fixed by the Act of July 26, 1866, and certainly those rights to land as against the Government could not be

enlarged or made to reach back to a prior date without the CONSENT OF CONGRESS. Without *such consent* no company under the Act of 1863 could devote *its lands* to another company, because *that act* required the land to be used for the purposes of the companies *first* made beneficiaries therein and for NO OTHER PURPOSE WHATEVER. The necessity *for the assent of Congress* is shown in U. S. *vs.* M., K. & T. Ry. Co., 141 U. S., 383. The Court *cannot ignore* the fact that the Act of 1866 gives land grant and indemnity rights to the M., K. & T. Co. BY NAME. The Court *cannot ignore the fact* that the company received *indemnity lands* under *that* act.

With these facts the ONUS is on the company to show *how* it could acquire any *other* indemnity lands under any other act. A recital in the patent is not evidence to overthrow or add to the Act of 1866, and *no recital* attempts to show HOW any such right could accrue.

THE CLAIM OF THE SETTLERS.

I. Is that they are protected as against the patents by their prior homestead and pre-emption settlements.

II. That the patent is *absolutely void* because the M., K. & T. Ry Co. had no right to *any* indemnity lands under the Act of 1863.

III. That as no indemnity selection was made under the Act of 1866, no right to indemnity lands could be given by a selection under the Act of 1863.

There is no *evidence* that the Secretary of the Interior approved or would have approved a claim to *these* lands for indemnity under the Act of 1866.

IV. If any right to indemnity lands had accrued under the Act of 1866, the Governor had no authority to issue patents therefor, and the patents are absolutely

void. He had no right to issue patents for *any* indemnity land under any act.

A decision now holding said patents void *can not prejudice the* occupants of *other lands*, by them purchased under the railway company patents, because they are protected by *section five* of the Anderson act of March 3, 1887. (24 Stat., 556.)

The foregoing and *other* questions will be presented and discussed in the following:

ARGUMENT—PART FIRST.

Justice to the *long-suffering* settlers requires a continuance of these cases IF NECESSARY to secure their legal and equitable rights, but justice also requires a DECISION NOW, on the merits, if, on the records, the plaintiffs in ejectment are *not entitled* to recover.

It is claimed that the settlers are entitled to judgment on the records. The lands in ODD-numbered sections will be FIRST considered.

AS TO CASES OF ARD AND WOOD.

THE PATENTS ARE VOID: (I) *On their face, and* (II) *for matter dehors.*

THE PATENTS ARE VOID ON THEIR FACE FOR SEVERAL REASONS:

I. *Because the lands are by the Act of March* 3, 1863 (12 Stat., 772), RESERVED *to the United States for indemnity selection for the Leavenworth, Lawr nce and Galveston Railroad, and the reservation is affirmed by the Act of July* 26, 1866. (14 Stat., 289.) This act makes a grant under which ALONE the Missouri, Kansas and Texas Co. (formerly Union Pacific, Southern Branch) can claim.

SEVEN CONSIDERATIONS.

This RESERVATION is shown by at least SEVEN different considerations:

1. The Act of 1863 makes a grant *in place* of *odd* sections for the L., L. & G. road, and as to lands lost therefrom by homestead settlements, or "for any purpose whatever," it provides that the Secretary of the Interior *shall select indemnity odd* sections within indemnity limits,

"which lands shall be held by the State of Kansas for the *use and purpose aforesaid.*"

The Act of 1866 in its *third proviso* to section one expressly *reserves* from its *operation all lands* previously set apart

"for the purpose of aiding in any object of internal improvement," etc.

The M., K. & T. Ry. Co. is *expressly* mentioned as *grantee* by its *then* name in the Act of 1866.

2. *The reservation is shown in principle and recognized in terms in* U. S. *vs.* M., K. & T. Ry. Co., 141 U. S., 358, 372.

The opinion referring to these *identical* indemnity lands says:

"The utmost that could be claimed in respect to lands within the indemnity limits of the Leavenworth road, is *that* the *odd-numbered sections* in those limits being designated by the Act of 1863 as the source from which to supply losses in the place limits of that road, *were excluded from the operation of the Act of* 1866."

True the question was not decided, because, as the Court said:

"We are dealing here with the *even-numbered* sections in the indemnity limits of the Leavenworth road."

But the *reasoning* of the Court and the question

decided, in *principle*, in that and other cases equally apply here.

Thus, in L., L. & G. R. R. Co. *vs.* U. S. (92 U. S., 247), it is said:

"Every tract [of land previously] *set apart for special uses* [as lands previously reserved for indemnity for a railroad] is RESERVED to the Government to enable it to enforce them."

And in Newhall *vs.* Sanger (92 U. S., 762), the Court, referring to the preceding case, said:

"We held that they [grants] did not embrace tracts RESERVED by competent authority for *any purpose*, or in any manner, although no exception of these was made in the grants themselves: and we confined a grant of every alternate section of 'land' to *such* whereto the *complete title was absolutely vested in the United States.*"

This is shown also and the authorities collected in the very able and exhaustive opinion in Bardon *vs.* Northern Pacific R. R. Co., 145 U. S., 535–546.

3. As *these lands* were *reserved* by the Act of 1863, to give *indemnity* landsto the L., L. & G. road, nothing in the Act of 1866 can be held as repealing that *reservation.*

The *general words* of the Act of 1866, giving indemnity rights in the "public lands," are to be so construed as not to apply to, or repeal the *special provisions* of the Act of 1863 as to these lands. Thus it has been stated:

"The general words of a statute may be *restrained* according to the *subject matter* to which * * * it relates." Broom Legal Max., 646; Sedgwick Stat., 2d Ed., 360.

"An affirmative statute does *not repeal* a precedent affirmative statute; and that if *the substance of both may stand together*, they should *both* be *enforced.*" Sedgwick 32; Potter's Dwarris, 74; Wallace *vs.* Holmes, 9 Blatchford, C. C., 65.

"A thing which is *given in particular* shall not be taken away by *general words. Generalis clausula non porrigitur ad ea quae specialiter sint comprehensa.*" Sedgwick, 361; Potter's Dwarris, 513, 668.

"Specific provisions * * * are not repealed or *affected* by the general words of a subsequent statute." Movius *vs.* Arthur, 95 U. S., 44; Arthur *vs.* Lahey, 96 U. S., 113.

In Fosdick *vs.* Perrysburg,, 14 Ohio St., 47, the rule is thus stated:

"It is an established rule in the construction of statutes that a subsequent statute treating a subject in *general* terms, and not expressly contradicting the provisions of a prior act, shall not be considered as intended to affect *more particular* [special] and positive provisions of the prior act, unless it is *absolutely* necessary to do so, in order to give its words *any* meaning."

4- The opinion of Harlan, J., in 141 U. S., 358, 372, above cited, is confirmed in a *legislative* construction of the reserving clause of the Act of 1863 by the Acts of Congress of April 21, 1876 (19 Stat., 35); May 1, 1880 (21 Stat., 140) and March 3, 1887 (24 Stat., 556), *intended* to meet THESE CASES.

House Report, No. 1619, 49th Congress, 1st Session, April 10, 1886, on the bill which became the Act of 1887, was made by Hon. J. A. Anderson, a Representative in Congress from Kansas, where these lands are situated, and it says:

"The bill protects the rights of all *bona fide* settlers within the limits of railroad grants in all the States and Territories, whose entries have been heretofore erroneously canceled OR THEIR APPLICATIONS DENIED on account of any railroad grant or the WITHDRAWAL OF PUBLIC LANDS for railroad purposes (except such as relinquished possession of their lands, and such as acquired other lands under the public land laws) where they had *remained in possession* of the land,

claiming right thereto, under ANY *claim*, under the general land laws of the United States."

And in aid of the *same purpose*, the matter contained in Senate Ex. Doc. No. 194, parts *one* and *two*, 50th Congress, 1st Session, was transmitted to the Senate by the Secretary of the Interior, May 16, 1888, and in which *some* of the lands now in controversy were included; others not included because the applications of settlers having been rejected do not appear. See page 79 (Ard, Sec. 2, T. 26, R. 20); the Senate Ex. Doc. No. 124 of the 49th Congress, 2d Session, was for the same purpose transmitted to the Senate March 2, 1887.

5. The Act of March 3, 1863 (12 Stat., 772) accepted by the L., L. & G. Company was not only a *law*, but a CONTRACT between the United States and the company, by which the odd sections within indemnity limits were solemnly set apart and reserved to the United States to fulfill its duty.

a. This is well settled, and hence that patents issued in violation of their terms are of no validity. (U. S. *vs.* Central Pacific R. R. Co., 118 U. S., 235; Schulenberg *vs.* Harriman, 21 Wall., 59; Sinking Fund Cases, 99 U. S., 700, 718; Farnsworth *vs.* Minn. & Pac. R. R., 92 U. S., 65; Union Pacific R. R. *vs.* U. S., 104 U. S., 662; Chamberlain *vs.* St. Paul & S. C. R., 92 U. S., 299; Atlantic and Pacific R. R. Co. case, 6 Interior Dept., Land Dec., 84, August 13, 1887.)

The United States by this act *agreed* that the odd sections should be *reserved* for *indemnity*, subject only to the right of settlers to make entries up to the time of selection as such indemnity.

b. This CONTRACT *continued in force*, not merely for ten years, but until released by act of Congress or judicial degree of forfeiture. (Schulenberg *vs.* Harriman, 21 Wall., 59).

The L., L. & G. Co. never in fact earned any indemnity lands, because it failed to complete its road. But its right to earn these *identical lands* was not taken away until the forfeiting act of Congress of July 24, 1876. (19 Stat., 101.) This act declared "FORFEITED TO THE UNITED STATES" all lands

"which have not been patented to said [L., L. & G.] railroad company by the United States under said grant, OR *earned by the completion of said road*" [meaning indemnity odd sections, including the lands of Ard and Wood in odd sections.]

And the act declares that all said lands so forfeited

"shall hereafter be subject to entry only under the provisions of the homestead laws of the United States."

Here is a *legislative construction* of the Act of 1863 that it *reserved* the indemnity lands now in question. While they were thus *reserved*, there could be no *lawful* selection of *these lands* in favor of the M., K. & T. Ry. Co. (Bardon *vs.* Northern Pacific R. R. Co., 145 U. S., 535; Senate Ex. Doc. No. 194, 50th Congress, 1st Session, and Part 2, p. 132.)

There was no selections after the Forfeiting act of 1876, no claim for any and *could not be*, because that act devoted them *solely* to homestead entries.

6. No selection could be lawfully made under the Acts of March 3, 1863 (12 Stat., 772), July 1, 1864 (13 Stat., 339), in connection with the Act of July 26, 1866 (14 Stat., 289), as *one act* for two reasons:

First.—a. At the October term, 1878, the Supreme Court practically held that the Act of 1864 was *inoperative* because *not accepted* by the Legislature of Kansas. Thus, in M., K. & T. Co. *vs.* Kansas Pacific Co., 97 U. S. 499, FIELD, J., says:

"This Act of 1864 *was never accepted by the State* of Kansas. No route of a road between the points desig-

nated in it was ever located by the company, nor was any map of the proposed route ever filed in the Department of the Interior. Nothing, indeed, was done by the State or company under the act until after *the grant it offered had been* SUPERSEDED by the acceptance of the greater and more valuable grant made by the subsequent Act of July 26, 1866, which covered the lands."

b. It is important to observe that in the Act of 1864 *Emporia* is *specifically named* as the starting point and that the road is to be made *via Council Grove*—an entirely different line with *different points* and shorter than the road authorized by the Act of July 26, 1866, hereafter mentioned.

c. It specified *no company* to make a road as did the Act of 1866 the M., K. &. T. Co., and hence contemplated a different road, *so far as any evidence is found* in the records of the cases now under consideration, and so far as *indemnity* lands are concerned.

d. The Legislature of Kansas could have conferred the grant of the Act of 1864 on *some other* company, but it did not. The Legislature refused to accept that act.

e. The Act of July 26, 1866, gave the M., K. & T. Ry. Co. a right to certain indemnity lands—not these—and there was no selection *under it* of these lands.

IT COULD NOT ACQUIRE ANY RIGHT TO INDEMNITY LAND UNDER ANY ACT BUT THAT OF 1866, whatever might be its right to GRANTED LAND *under any other act.*

Second.—a. It is certain that Congress by the Act of 1866 did *not* intend to give to the M., K. & T. Co. rights under the Act of 1864, because Congress had *refused to consent to that portion of the Kansas Act of February* 9, 1864, *asking that the Emporia branch should*

be extended northward to Fort Riley so as thereby to make one line of road. (See that Kansas act.)

b. Congress did *not consent to extend the branch*, but made a grant for an *independent* road from Emporia to the Union Pacific road, near Fort Riley, by the Act of July 1, 1864, which, however, the *State did not accept*.

c. And finally, as to the Act of 1864, and as *absolutely conclusive*, its proposed grant did *not reach south of Emporia*—the point where the Atchison, Topeka and Santa Fe road crosses the road of the M., K. & T. Ry. Co.—and these lands *are south of it*.

7. The question of *reservation* by the Act of 1863, of the *odd sections* for indemnity for the L., L. & G. R. R. Co. as against the M., K. & T. Ry. Co. claiming under the Act of 1866, is very different from that alone between a Railroad Co. and the United States as to indemnity lands abandoned by settlers. The question if a settler on land within indemnity limits abandons his homestead, it then becomes subject to indemnity selection is very different from the effect of the forfeiture of a right to select indemnity lands.

> Newall *vs.* Sanger, 92 U. S., 761, 764; M., K. & T. Co. *vs.* Noyes, 25 Kas., 340; Ryan *vs.* Central Pacific R. R., 99 U. S., 386; St. Paul R. R. *vs.* Winona R. R., 112 U. S., 739; K. P. R. R. *vs.* Dunmeyer, 113 U. S., 629, 640, 641.

In such case it might be claimed that the abandonment of indemnity land leaves it as *public land* to the United States, which can deal with the question of *indemnity* as one only between the Government and the Railway Co. But the question *now* is as to the *status* of lands which the United States by *contract reserved* for *indemnity* for the L., L. & G. Co. for the whole period from the granting act of March 3, 1866,

to the *forfeiting act* of July 26, 1876. The cases cited show that if a settler on lands within the granted 10-mile limits abandons his homestead, the land *reverts* to the Government, and does not inure to the grant.

THE CONCLUSION is inevitable that these lands were *reserved* from indemnity selection in favor of any company except the L., L. & G.

THE "BREWSTER CASE"—Kansas City and S. K. R. R. *vs.* the Attorney-General—118 U. S., 682.

THERE IS NOTHING IN THE BREWSTER CASE WHICH DENIES THIS RESERVATION—not one word as applicable here.

1. *This is expressly shown*, not only by the passage above cited from the opinion in U. S. *vs.* M., K. & T. Co., 141 U. S., p. 372, but also by what is further said as to the rights of settlers in the same opinion, pp. 377–380. *The rights of* SETTLERS *were not involved in the Brewster case.*

The lands of Ard in Sec. 2, T. 26, R. 20, and of Maddox in Sec. 24, T. 25, R. 20, were not involved in the Brewster case: that case was a suit by the U. S. *vs.* the L., L. & G. R. R. Co., under its name changed to the Kansas City, Lawrence and Southern Kansas R. R. Co. The case in 141 U. S. is against a different company—the M., K. & T. Ry. Co.

2. And the Brewster case in *principle* and on the questions *now made* and on the records, affirms the conclusion of Justice Harlan already quoted.

This is evidently the view taken by the Interior Department of the opinion in the *Brewster case.*

After Secretary Lamar had decided—as he did June 16, 1886 (4 Land Decisions, 573)—that the patents now in controversy were unlawfully issued, an application was made to the Secretary to have the suit dismissed on the ground that it had been in effect decided by the *Brewster case*, 118 U. S., 682.

The acting Secretary on December 17, 1886, refused the application. His reasoning is commended to the attention of the Court.

3. In the *Brewster case* reference was made to certain rights alleged to have been acquired by ASSIGNMENT of the Atchison, Topeka and Santa Fe R. R. Co. of its right to make a branch road from Emporia "down the Neosho Valley to the point where the 'L., L. & G. Road' enters the Neosho Valley."

The Commissioner of the General Land Office in a letter, March 11, 1882, to the Secretary of the Interior on the subject of these lands, said:

"If * * * said assignment is incapable of being set aside, then the right of the M., K. & T. Co. to lands in the conflicting limits described, could attach under the Act of March 3, 1863, *to those lands* ONLY which *are situated* WEST of the line of the L., L. & G. road since the grant to the A., T. & S. F. Co., for the branch was to a point where the L., L. & G. Railroad enters said valley. Therefore whatever rights the M., K. & T. Co. possessed in the conflicting limits EAST *of the L., L. & G. Railroad*, must have *rested under the Act July 26*, 1866, ONLY, and at the date of that act those lands were *reserved* for the benefit of the L., L. & G. Co."

They were *reserved* by the Act of 1863, and there is nothing in the records now before the Court to show that the M., K. & T. Co. made any branch or otherwise earned lands under the Act of 1863.

4. And whatever rights, if any, the M., K. & T. Ry. Co. could acquire under the Act of 1863, could only take effect *as of the date* of the Act of July 26, 1866, under which alone its rights accrued. All settlement rights initiated in granted even section prior to the filing of its map of definite location, and all settlement rights initiated on indemnity lands prior to selection as indemnity, would be protected by settlement in favor of settlers.

5. And if necessary—as it is not—the Court would be asked to reconsider *that* case, *so far as relates to these odd sections*, on the argument on file in the case in 141 U. S., 358, and especially pages 148–178 of that argument. Such reconsideration would be justified by the remarks of Justice Field in Bardon *vs.* Northern Pacific R. R., 145 U. S., 535.

II. THE PATENTS ARE VOID, BECAUSE THE GOVERNOR OF KANSAS HAD NO AUTHORITY TO ISSUE THEM.

FIVE CONSIDERATIONS.

This is shown by five considerations.

1. *This is shown by the statutes.*

The Act of 1866 makes a grant of *odd* sections in place EXPRESSLY to the M., K. & T. Ry. Co., by its former name of the Union Pacific, S. B., with a right to indemnity "from the public lands of the U. S." Section 3 provides that on the Governor's certificate of the completion of ten mile sections of road:

"then the *Secretary of the Interior* shall issue to the said company *patents* for so many sections of the land herein granted within the limits above named," etc.

Then as to *indemnity lands*, section one provides that

"it shall be the duty of the *Secretary of the Interior to cause* to be selected for the purpose aforesaid [that is, to be patented by the U. S.], from the public lands of the United States," etc., indemnity lands.

It is clear that the patents were to be issued by the *United States*, NOT the *Governor*.

It has been substantially so decided.

In Kansas City R. R. Co. *vs.* Attorney-General Brewster, 118 U. S., 692, as to patents for *indemnity* lands it was said:

"It is true that the Secretary of the Interior, while acknowledging the claim [of the M., K. & T. Co.]

to have been made under all acts [of 1863 1864, 1866], certified the lands to the State of Kansas, in accordance with the terms of the Act of 1863 and 1864, *instead of issuing patents directly* to the railroad company *as was provided for in the Act of* 1866, but since that company had all the rights conferred by all three of these statutes, and by the ratification by the State of Kansas of the transfer from the Atchison, Topeka and Santa Fe Railroad Co., and since the State, after these lands were certified to it for the benefit of this company, issued to it patents of the State for those lands, it is obvious that the company thus acquired the real ownership and *the equitable interest* on the lands which it had earned by building the road in accordance with the provisions of all the statutes, and all the contracts made upon the subject."

In that case the Legislature of Kansas *accepted* the Act of 1863 as it required. And because *that company* as the court held, had an *equitable interest* the court refused to cancel the illegally issued and void patents. But *here* and upon the records in these cases it is to be said:

(1) The State was not required to, and did not, accept the Act of 1866.

(2) There is *in this case* no evidence of an assignment by the Atchison, Topeka and Santa Fe Co. of any interest under the Act of 1863, and none to assign to the M., K. & T. Co. as in the Brewster case, 118 U. S. (See U. S. *vs.* M., K. & T. Co., 141 U. S., 358, 383, 372, 379 381.) And the Atchison, Topeka and Santa Fe Co. claimed under the *same Act of* 1863 with the L., L. & G. Co., so that it was subjected to the *same reservations.*

(3) The M., K. & T. Co., deriving its rights from the United States *solely* under the Act of 1866, and thereby assuming obligations to carry mails, troops, etc., and to maintain *that road*, could not, *without the assent of*

Congress, accept grants and assume the *additional* onerous liabilities and obligations to the United States required of *other companies* by the Act of 1863.

The necessity for the *assent of Congress* is shown in U. S. *vs.* M., K. & T. Ry. Co., 141 U. S., 383.

a. The Court refers to an assignment by the L., L. & G. R. R. Co. of its right to certain lands. It could make no assignment without the consent of Congress (U. S. *vs.* Central Pacific R. R., 118 U. S., 235, 238). None was given. As that company *never completed* its road and never earned any *indemnity* lands it had *none of these to assign*. And its right to any was forfeited by the Act of July 24, 1876 (19 Stat., 101), as heretofore shown.

b. The Court also (141 U. S., 383) says, "the assignment by the Atchison, Topeka and Santa Fe Company being approved by the State of Kansas and *by Congress* in the *Act of* 1866, was valid."

However that may be, there is no evidence in the records of the cases now under consideration of any such assignment. If we can look outside of the records it will be seen referred to in the Brewster case (141 U. S., 69) and was dated March 19, 1866. It is respectfully submitted that there is no evidence that Congress knew of this assignment when the Act of 1866 was passed, and if so the fact that nothing in that act refers to the assignment would seem to indicate that it was not assented to. Besides, at *that time* the L., L. & G. R. R. Co. had a *subsisting right to earn the indemnity odd sections*, which continued until the Act of 1876. But it is respectfully submitted that all this is *now* immaterial because (1) there is in *these* records no evidence as to assignment, and (2) the Governor's patents are void, and (3) because the settlers are protected by their settlement rights. And *why would not the assent*

of the State to the Act of 1866 also be essential to perfect an assignment?

3. *The Interior Department has in effect construed the Act of 1866 as requiring patents from the United States for indemnity lands.* (See letter March 25, 1867. Printed Record, 66 [122], in case of Kansas City, L. & S. R. R. *vs.* Brewster, 118 U. S., 682.)

4. *The same construction is given in the patents by* THE *United States for indemnity lands in the cases herein of Ard vs. Pratt (Record, 4) and in Maddox vs. Burnham, (Record, 5) and so in other patents generally.* (See U. S. Senate Ex. Doc. No. 194, 50th Congress, 1st session, Part 1, p. 5, and Part 2, pp. 106–113, and indemnity selections, Part 5, p. 5, and Part 2, pp. 143–148, including *these lands.*)

5. Finally, on the question of any equitable title of the M., K. & T. Ry Co. to ANY lands, the remarks above quoted from the opinion of the Supreme Court in the Brewster case, as to rights acquired under the Acts of 1863, 1864 and 1866, as a unit, cannot apply to *these* lands, because, as already shown, the Act of 1864 did not reach these lands *south* of Emporia.

III. *The Governor's* patent is void as evidence of legal title *as to the land therein described, because assuming to be under the Act of* 1863; *the M., K. & T. Co. had no right to any land under that act.*

This is so for at least FOUR SEVERAL REASONS:

1. Even upon the theory of the existence of the assignments referred to, the right of the company, if any, would arise *under* and *date* from the Act of 1866—not that of 1863. All acts are *prospective* in their operation unless expressly otherwise made, and then not so as to divest vested rights.

2. No law authorized the Secretary of the Interior to certify *indemnity* selection to the Governor of Kansas for any purpose of the M., K. & T. R'y. Co.

3. The Act of July 26, 1866 (14 Stat., 289) having given the M., K. & T. Co. a right to indemnity lands in BOTH *odd* and *even* numbered sections, no *further* right to *reach back* to a *prior granting act* and thereby *increase its indemnity lands* could be secured to that company *without the assent of Congress*, and no such assent was ever given—that is, no assent to give *antedated* rights. The argument on this point has been somewhat presented in the Statement of Facts, to which reference is made *ante*, pp. 9–10.

4. The Governor's patents are void because no indemnity selection was made under the Act of 1866 for the land covered by them.

This must be so for at least FIVE SEVERAL REASONS:

(1) There is no evidence that the Secretary of the Interior would have made a selection of these odd sections under the Act of 1866.

(2) He might have regarded them as *reserved* by the Act of 1863 from the operation of the latter act in accordance with the principle announced by Harlan, J., in 141 U. S., 344, 372.

(3) And we may reasonably *infer that* the object of selecting under the Act of 1863 rather than under the Act of 1866, *was to cut off the rights of settlers, which would have been saved to them* if the selection had been made under the Act of 1866; *and* such a palpable fraud Congress did not intend to sanction, and this Court will not aid.

(4) There is no evidence that the President would have issued any patent for any of these lands to the M., K. & T. Ry. Co. under the Act of 1863, and hence the Governor issued them without authority.

(5) It cannot be said the mode of securing a patent was a mere irregularity or that the company had any equitable right to the lands as *dating* with the Act of 1863.

On the foregoing points the language of Brewer, Judge, September 3, 1885, in the Circuit Court, in the case of Attorney-General Brewster *vs.* The Kansas City, L. & S. K. R. R. (formerly L., L. & G. R. R. Co.) (25 Federal Reporter, 243, 246), is alike appropriate and forcible:

"The Commissioner of the General Land Office recognized the claim [for indemnity lands] as under the Act of 1863 *alone*, and certified the lands to the State. This was done in April, 1873. * * * But it is said that under the Act of 1866 it did have a valid claim, and that the mistake of the Commissioner in naming the statute does not destroy the equitable rights. But how can it be inferred that the Secretary of the Interior would have recognized *any claim* under the Act of 1866, or, recognizing it, MADE A SELECTION OF THESE LANDS in satisfaction thereof. It does not seem to me that under the testimony the Commissioner could, or ought to, have selected THESE lands."

The case went to the Supreme Court, but this particular reasoning remains unanswered and unchanged.

And it is respectfully submitted that this Court has never said that *indemnity rights would date from the Act of* 1863. The *selection* of indemnity lands could only be made *after* and *under* the Act of 1866.

5. Finally on this point to support the patent as *evidence of title*, under the Act of 1863, there must be evidence either authorized *in it* or *aliunde*, showing authority to issue it.

The reasoning of the Court in Swann *vs.* Miller, 82 Alabama, 530, 538, 539–40, is appropriate. That case related to lands under a railroad land grant by Congress by Act of June 3, 1856.

The Court said:

"There is neither allegation nor proof that the requirements of section 4 of the Act of 1856 had been

complied with in such manner as to authorize these alleged contracts of sale.

The Court—pp. 538, 539—quotes 21 Wall., 44, 59:

"No conveyance in violation of the terms of those acts, the road not having been constructed, could have any title."

The Court says again, pp. 539, 540:

"It will scarcely be contended that a sale made in contravention of the letter and policy of the law is merely voidable—it cannot be other than void *ab initio*."

Having thus shown that the patents *are void on their face*, the next inquiry is—Could they support a recovery in ejectment?

ARGUMENT.—PART SECOND.

THE VOID PATENTS COULD NOT SUPPORT A RECOVERY IN EJECTMENT.

On this THREE CONSIDERATIONS are presented:

1. *The plaintiffs in ejectment could only recover on the strength of their own title, not on any defect in defendant's title.*

Both at law and in equity a plaintiff must recover on the strength of his own title. (Gilmer *vs.* Poindexter, 10 How., 256, 267; Watts *vs.* Lindsey, 7 Wheat, 158; Harley *vs.* Street, 29 Iowa, 434; Reed *vs.* Wright, 29 Greene, 15; Lathrop *vs.* Am. Em. Co., 41 Iowa, 549.)

And the plaintiff in ejectment must have a *perfect legal title*. Rogers *vs.* Cawood, 55 American Dec., 731; (Laurissini *vs.* Corquette, 57 Am. Dec., 201; Clark *vs.* Diggs, 41 Am. Dec., 73; Wolfe *vs.* Dowell, 51 Am. Dec., 147; Ketleringham *vs.* Blair Co., 66 Iowa, 282.)

Evidence in defense may disprove even a *prima facie* case. (Huntington *vs.* Jewett, 25 Iowa, 250; Gardner *vs.* Tisdale, 60 Am. Dec., 407.)

II. *The patents are not merely voidable, but absolutely void, for* (1) *want of authority in the Governor to issue them, and* (2) *because the lands were reserved from indemnity selection.*

This is not a case in which the Governor acted *judicially*—exercising *judgment* and discretion. He had no jurisdiction over the subject matter. His was not merely an error in judgment in executing a discretionary power vested in him: there was an absolute want of power.

In such case the patent is not merely *voidable*, it is absolutely *void*, and so is open to *collateral attack*. (M., K. & T. Ry. Co. *vs.* Noyes, 25 Kas., 340, 348; Neer *vs.* Williams, 27 Kas., 1.)

Thus in Polk *vs.* Wendell, 9 Cranch, 99, Chief Justice Marshall said:

"A patent is void at law, * * * * if an officer who issued the patent had no authority to do so." (S. C. 5 Wheat, 303; Ladega *vs.* Rowland, 2 How., 590; U. S. *vs.* Stone, 2 Wall., 525; 5 Opinions, Atty-Gen., 7; 14 Opinions, 157.

In Steel *vs.* Smelting Co., 106 U. S., 447, 453, the Court said as to land patents and the lands therein described:

"If no legislation authorized their sale, or if they had been previously disposed of *or reserved for sale*, the patent would be inoperative to pass the title and objection to it could be taken on these grounds at any time and in any form of action."

To the same effect see Swann *vs.* Miller, 1 Southern Rep., 67; 82 Alab., 530, 539.

Schulenberg *vs.* Harriman, 21 Wall., 59; Farnsworth *vs.* Minn. & P. R., 92 U. S., 65; 5 Opinions, Atty-Gen., 7, 12; Jackson *vs.* Lawson, 10 Johns. Rep., 26; Ross *vs.* Borland, 1 Pet., 656; Brown *vs.* Clements, 3 How., 650.

In the case of Stoddard *vs.* Howard, 2 How., 285, a patent for lands *reserved* was held void.

III. *If the patents even conveyed* AN EQUITY—*as they did not—they could not support an ejectment suit.* This requires a *legal title.* (S. C. & St. P. R. R. *vs.* Osceola, 43 Iowa, 321; Swayze *vs.* Burk, 12 Pet., 11; Bagnell *vs.* Broderick, 13 Pet., 436; Gilmer *vs.* Poindexter, 10 How., 257; Fenn *vs.* Holme, 21 How., 481; Hooper *vs.* Scheimer, 23 How., 235; Speerburn *vs.* Cardova, 24 How., 423.)

Even a State law cannot confer on the equitable owner the right to maintain ejectments in the courts of the United States against the patentee. (Bagnell *vs.* Broderick, 13 Pet., 436; Fenn *vs.* Holme, 21 How., 481; Hooper *vs.* Scheimer, 23 How., 236.)

The petitions commencing these actions were as *at law*, not as in *equity.*

THE CONCLUSION is that the patents were absolutely void.

ARGUMENT.—PART THIRD.

THE DEFENDANTS IN THE EJECTMENT SUITS COULD MAKE THE OBJECTION TO THE VALIDITY OF THE PATENTS.

I. *As on their face they were void*, it was the duty of the State Court *sua sponte* to render judgment against the plaintiffs in ejectment.

II. *But if the patents were only voidable the defendants in ejectment were in privity with the title and could make defense.*

1. A possession taken, as that of Ard and Wood under claim of right, and never abandoned, is itself a *title*, which puts the occupant in *privity* with the legal title. (Neer *vs.* Williams, 27 Kansas, 1, 24; authorities cited in Lawrence's brief.)

Thus it is said:

"A patent for land the sale of which is unauthorized

may always be shown invalid, by one holding adversely, *although the title be that merely of naked possession.*" (American Digest Annual 1893, p. 4170, citing Fruit Land Co. *vs.* Moir, 22 Pacific Reporter, 55 ; 23 *Id.*, 359 ; 83 Cal., 101 ; Edwards *vs.* Rolley, 31 Pacific Rep., 269 ; 96 Cal., 408.)

"A homestead claimant is in such privity with the title of the United States, that he may attack a patent for the land." (American Digest Annual 1892, p. 4329; Stewart *vs.* Alstock, Oregon, 29 Pacific Rep., 553.)

So it is said :

"A land patent from the United States may be shown to be void by *extrinsic evidence* of a want of authority to issue it." (American Digest Annual 1893, p. 4170, citing Lakin *vs.* Dolly, U. S. Circuit Court Appeals Rep., N. W. Reporter ; 53 Fed. Rep , 333 ; Lakin *vs.* Roberts, *Id.*)

2. The settlers have more than a naked *rightful* possession, they have a *subsisting* right, (1) recognized by the Interior Department and (2) existing under the acts of March 3, 1887 (24 Stat., 556) ; April 21, 1876 (19 Stat., 35) ; May 14, 1880 (21 Stat., 140), and July 26, 1866 (14 Stat., 289).

These acts give relief :

(1) Against the illegal withdrawal of lands ;

(2) Against the unlawful refusal of local land officers to permit proofs by settlers ; and they

(3) Waive all *laches*, and omissions of settlers.

The settlers *in possession* have *rights recognized by the Government;* that the statutes construed together *give to those occupants* a right to make NEW ENTRIES after the illegal patents are canceled. The question of their *laches* is *one between them and the Government alone*, and so they have *every right* to *object to the patents* which the Government has.

The plaintiffs in ejectment are not innocent purchasers.

"The rules respecting a purchaser without notice * * * apply fully only to the purchaser of the *legal* estate. Even the purchaser of *an equity* is bound to take notice of any prior equity." (Vattier *vs.* Hinde, 7 Pet., 271; Hallet *vs.* Collins, 10 How., 174; Shuas *vs.* Caig, 7 Cranch, 34)

And the possession of the settlers is *notice*. (Tucker *vs.* Vanderwark, 21 Kas., 263; M., K. & T. Co. *vs.* Noyes, 25 Kas., 340.)

THE CONCLUSION *is that the patents are void; and the judgments of the Supreme Court of Kansas were erroneous, and should be reversed.*

PART FOURTH.

ARGUMENT AS TO THE WHOLE FOUR CASES.

As to *all the cases*, if the patents were not *absolutely void*, but only *voidable*, and so conveying a legal title, the plaintiffs in ejectment were not entitled to recover, because the evidence *dehors* shows a prior subsisting homestead or pre-emption claim of the settlers.

This makes the questions:

I. WHETHER SUCH RIGHT CAN BE MADE AVAILABLE AS A DEFENSE IN EJECTMENT UNDER THE KANSAS LAW; and

II. WHETHER SUCH SETTLERS' HOMESTEAD OR PRE-EMPTION RIGHTS EXISTED (1) BEFORE ANY RIGHT OF THE RAILWAY COMPANY ATTACHED, AND (2) YET EXIST.

I. THE INCHOATE RIGHTS OR EQUITY OF A HOMESTEAD OR PRE EMPTION SETTLER CAN BE MADE AVAILABLE AS A DEFENSE IN EJECTMENT AS AGAINST A PATENT ISSUED ON INDEMNITY SELECTION APPROVED AFTER SUCH RIGHT ACCRUED.

This question was answered in the affirmative in the Circuit Court in case of U. S. *vs.* M., K. & T. Ry. Co.,

37 Federal Rep., 68–72, the same reported in 141 U. S., 358). Brewer, J., said:

"So far as any claim is made in reference to *particular tracts* upon which a homestead or pre-emption settlement was made *before any rights of the railroad company attached* is concerned, it is enough to say that equity does not interfere where there is a full and adequate remedy *at law*, and that *these parties can, under the settled practice in Kansas, obtain full protection of their individual rights without the interference* of the United States as plaintiff."

The Supreme Court on appeal held that the United States would, in such case, interfere by bill to cancel patents, and thereby protect settlers, but the practice as stated in Kansas was not controverted. And Judge Brewer's opinion expressly refers to "remedy at law" —that is, defense in ejectment. In the four cases now being considered the defense was made and the right to make it was not questioned by the Supreme Court of Kansas, either on the *pleading*, or on the right to do so. (See M., K. & T. Ry. Co., 25 Kas., 340; K. P. Ry. Co. *vs.* Dunmeyer, 19 Kas., 539; S. C. 24 Kas., 725; affirmed 113 U. S., 629.)

The Kansas Civil Code of Practice, like that of many other States, expressly authorizes such defense. (Dassler's Compiled Laws 1881, p. 615, sec. 94.)

Even if the patents passed a *legal title*—as they did not—the judgment of the Court could give it to the settlers. (Johnson *vs.* Towsley, 13 Wall., 72; Moore *vs.* Robbins, 96 U. S., 530; Rector *vs.* Gibbons, 111 U. S., 276; Smelting Co. *vs.* Kemp, 104 U. S., 636; Steele *vs.* Smelting Co., 106 U. S., 453, cited *ante*.

No matter what the practice may be in ejectment in the Courts of the United States the question *now is*, Was *there error* in the Kansas Court in overruling the defense?

THE CONCLUSION IS, there is then no legal difficulty in the way of now making the defense against the actions to recover under the patents.

II. THE HOMESTEAD AND PRE-EMPTION RIGHTS OF THE SETTLERS EXISTED (1) BEFORE ANY POSSIBLE RIGHT OF THE RAILWAY COMPANY ATTACHED, AND (2) YET EXIST.

No right of the Railway Company could attach until the approval of the indemnity selections. (U. S. *vs.* M., K. & T. Co., 141 U. S., 358; Railroad Co. *vs.* Price, 133 U. S., 496, 511.) Until such approval settlers could make homestead and pre-emption settlement and acquire right thereby. (St. Paul R. R. *vs.* Winona R., 112 U. S., 731.) The right to *granted lands* in *place* attaches when the map of definite locations is filed in the General Land Office. (Barney *vs.* Winona, 117 U. S., 228.)

SOME FACTS: The map of location of the M., K. & T. road was filed December 6, 1866. (A. T. S. F. R. *vs.* Rockwood, 25 Kas., 295; M., K. & T. Co. *vs.* Noyes, 25 Kas., 340; Ard *vs.* Pratt, 43 Kas., 419.)

THE DATES OF RAILROAD CLAIM.

1. April 10, 1873, indemnity selection approved for lands in sections 11 and 1.
2. May 19, 1873, patent of Governor.
3. April 14, 1873, indemnity selection of sections 2 and 24.
4. November 3, 1873, patent of U. S. to Ry. Co.

THE DATES OF SETTLERS' CLAIMS.

1. July 11, 1866, Ard's homestead and pre-emption claim on section 11. June, 1870, Wood's settlement.
2. *Void on its face and* for matter *dehors.*
3. July 14, 1866, Ard's settlement in section 2. October 26, 1866, Maddox settlement in section 24.
4. Voidable because of settlers' claims.

PROPOSITIONS OF LAW.

I. *Where homestead or pre-emption rights attach they cannot be displaced by subsequent selection as indemnity for Railroads.*

Thus, in U. S. *vs.* M., K. & T. Co., 141 U. S., 358, the court say as to lands now in controversy, that:

"Within the indemnity limits of the Leavenworth

road, pre-emption and homestead rights may have legally attached before their final selection as indemnity lands for the Missouri, Kansas Company. And rights thus attaching would not be displaced by subsequent selection, and by issuing patents to the Railroad Co."

II. *A refusal of the local land officers to permit settlers to make proof does not defeat their rights.*

The local land officers did refuse to permit *these settlers* to make proof and procure evidence of their right, because, as the Commissioner of the General Land Office has said :

1. "It was THEN held that the right of the company attached to *indemnity lands* at the same time it did to the granted lands,"*—a doctrine since overruled. And,

2. Because of the illegal withdrawal from entry of these lands by letters of March 19 and 25, 1867, of the Commissioner of the General Land Office. (See letters in Neer *vs.* Williams, 27 Kan., 59.) And,

3. Because it was *then* erroneously supposed that some or all these lands would fall within the *granted* limits of the M., K. & T. road.

But the rights of settlers are not lost by such refusal. The Supreme Court has decided that.

"Where a party has settled upon public land with a view to acquire a right of pre-emption, the land being open for settlement, his right thus initiated is not prejudiced by a refusal of the local land officers to receive his proofs of settlement, upon an erroneous opinion that the land is reserved from sale." (Shepley et al., *vs.* Cowan et al., 91 U. S., 330 ; Lytle *vs.* Arkansas, 9 How., 333 ; Quinn *vs.* Chapman, 111 U. S., 445.)

The settlers were not bound to make any tender to the officers of the local land office.

A party is excused from doing a vain and useless

*Letter Comm'r General Land Office to Wm. Lawrence, Dec. 31, 1885.

thing. (Van Wyck *vs.* Kneavals, 106 U. S., 360; Ry. Co. *vs.* Dunmeyer, 24 Kas., 725; S. C. 113 U. S., 629.)

Lex non cogit impossibilia. "The performance of a condition shall be excused by the default of the obligee * * if he do any act which renders it impossible for the obligor to perform his engagements." (Broom's Legal Max., 242; 2 Parson's Cont. (6th ed.), 523; Bowery Nat. Bank *vs.* Mayor, 63 N. Y., 336-340; Campbell *vs.* U. S., 107 U. S., 410. See cases collected, 5 Lawrence's Comptroller Decisions, 24.)

III. *Even if the settlers were negligent or in laches in making proof, or otherwise, this would not give the Ry. Co. any right.*

It was said by the Commissioner of the General Land Office as to some of these lands that a settler may be in *laches.*

"but for that reason alone the [Ry.] company's right could not vest. That was a question *between the Government and himself*, in which the company should have no voice [Copp, L. O., Vol. 11, pp. 219, 314; Emerson *vs.* Central Pacific R. R., Vol. 3, Secretary Int. Land Dec., 117; *Id* 166; *Id.* 227; *Id.* 490; *Id.* 305; K. P. R. R. *vs.* Dunmeyer, 113 U. S., 629], for at the date of the selection he had valuable improvements on the lands, and was in actual possession thereof, and it was no longer 'public land' and subject to such selection." (Letter, December 31, 1885, to William Lawrence.)

To the same effect is Shipley *vs.* Cowan, 91 U. S., 330, 337, 338; Johnson *vs.* Towsley, 13 Wall., 72; Frisbee *vs.* Whitney, 9 Wall., 187.

In Emerson *vs.* Central Pacific R. R. (3 Land Dec., 117) the Secretary of the Interior held, September 18, 1884:

"Where a pre-emption claim has attached by settlement, on offered land, though the settler may be *in laches* with his filing, it is excepted from the operation of any grant which is limited to lands free from such claims."

The policy of the Government has always been to relieve settlers from the effect of laches. (See Act July 14, 1832; Lytle *vs.* Arkansas, 22 How., 208, per McLean, J.)

IV. *The withdrawal by the Commissioner of the General Land Office of the* INDEMNITY *lands from settlement by letter of March* 19, 1867, *was illegal and void.*

The Act of 1866, Sec. 4, authorized the Secretary of the Interior, upon the filing of map of definite location of road,

"to withdraw from the *market* the lands GRANTED by this act."

It has been decided, Barney *vs.* Winona R., 117 U. S., 228, that:

"In the construction of land grant acts, in aid of railroads, 'granted lands' are those falling within the limits specially designated; but, 'indemnity lands' are lands selected," etc. (K. P. R. *vs.* A. T. S. F. Co., 112 U. S., 422.)

The Act of 1866, by *expressly* giving *this* limited power of withdrawal, excluded any other: *expressio unius*, etc. This question is set at rest by Miller, J., in St. Paul R. *vs.* Winona R., 112 U. S., 731, who repudiates the idea that settlers could be shut off from indemnity lands to await the pleasure of the railroad company, and who pertinently says:

"Had the settlers in that populous region no right to buy of the Government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation and forbidden to cultivation?" (See Kansas Pacific R. R. Co. *vs.* Dunmeyer, 113 U. S., 637.)

In Woolsey *vs.* Chapman, 101 U. S., 755, there was statutory authority to withdraw lands. The Court said of the withdrawal in that case:

"It was such a proclamation * * * reserving the lands from sale as was *contemplated by the act.*"

In the case of the Atlantic and Pacific Railroad Company, August 13, 1887 (6 Land Dec., 84), it is more than intimated by Secretary Lamar that unless a land grant act *in terms* authorizes a *withdrawal of indemnity lands*, there is no general implied power to do so. He says, p. 87:

"I should at least have such doubts of the existence of any such authority as to have restrained me from its exercise."

He shows that it is no *part of the contract* between the United States to withdraw the lands, and when there is *no contract* and *no law* how can it be done?

Such withdrawal would *defeat the purpose* of Congress as announced by Miller, J., *ante.*

And it was held March 4, 1890, in Harris *vs.* Northern Pacific R. R., 10 Land Decs., 264, decided *under act of March* 3, 1887, that

"Land covered by a claim *resting on settlement, improvement* and *occupancy*, and *existing at the date of withdrawal* on general route, is *excepted from the operation of* such withdrawal."

Both of the claims of Ard and that of Maddox come within this ruling.

THE CONCLUSION is, that the withdrawal of *indemnity* lands was illegal and void, and in any event that settlers are to be protected.

V. *If there was a homestead or pre-emption settler on a tract of land, with a right* INITIATED, *but not per-*

fected, the Acts of 1863 *and* 1866 *reserve such lands from indemnity settlers.*

1. Ard made settlement July 14, 1866; Wood, June, 1870; Maddox, October 26, 1866. The indemnity selection was April, 1873. The *very* MOMENT a settlement was made a right attached in the settler to perfect a title, and at THAT MOMENT of settlement, the lands were *reserved* from indemnity selection by the Act of 1866, the first *proviso* in section one declaring:

"that any and all lands (1) heretofore reserved to the U. S. by any act of Congress, or (2) in *any other manner* by competent authority for * * any * * purpose *whatever*, be, and the same are hereby reserved *and excepted from the* OPERATION *of this act*"—from ANY *operation* of it—from any *indemnity selection.*

2. The homestead and pre-emption laws were *modes* of *reservation*, giving settlers a right to perfect title. This is a *perpetual reservation*, which was *not released*, even *by a failure of settlers to perfect title.* The lands were "excepted from the operation of the [*whole*] act"—not merely until a settler failed to perfect his right, but for *all time.* In Shipley *vs.* Cowan, 91 U. S., 330, it is expressly shown (pp. 337–8) that settlers acquired *priority* over other claimants *by the act of settlement*, although the Government might object to laches, and it is said (p. 338):

"In all such cases the *first in time* in the commencement of proceedings for the acquisition of title, when the same are regularly followed up, is deemed to be the first in right."

In Franklin *vs.* Murch, 10 Land Decs., 582, May 20, 1890, held:

"The act of settlement is complete from the *instant* the settler goes upon the land with the intention of making it his home and performs *some act* indicative of

such intent." (U. S. *vs.* Atterbery, 8 Land Decs., 173; Bowman *vs.* Davis, 12 Land Decs., 415.)

So in the able opinion of McLean, J., in Lytle *vs.* Arkansas, 22 How., 193, 208–209, it is said in reference to the rights of settlers:

"The policy of the law was where *vested rights* had accrued, which by reason of delays in the completion of surveys, could not be carried out, the Government gave relief by extending the law. And *the inchoate right* was secured by the policy of the Government. It is therefore not strictly accurate to say the party entering a pre-emption has no right. *He has a right recognized by the Government* by which he is enabled to perfect his right, and under such circumstances *no new entry could interfere with a prior one though imperfect.*"

3. *The failure by a settler to perfect title*, or *abandonment*, or the *cancellation of a* pre-emption claim, does not subject the land to a granting act, but it *reverts* to the United States.

Bardon *vs.* Northern Pacific R., 145 U. S., 535; in the argument of which as reported cases are collected. Darcy *vs.* Northern Pacific R., 17 Land Dec., 265; Newhall *vs.* Sanger, 92 U. S., 761, 764; M., K. & T. Ry. Co. *vs.* Noyes, 25 Kas., 340; A. T. S. F. R. *vs.* Rockwood, 25 Kas., 292; Ryan *vs.* Central Pacific R., 99 U. S., 386; St. Paul R. *vs.* Winona R., 112 U. S., 730; Emerson *vs.* Central Pacific R., 3 Land Dec., 117, 271; 11 Copp's Land Owner, 219, 314; K. P. R. R. *vs.* Dunmeyer, 113 U. S., 629, 640, 641; L., L. & G. R. *vs.* U. S., 92 U. S., 741; Raeschlaub *vs.* Union Pacific R., 6 Land Dec., 750.

And in Union Pacific R. R. Co. *vs.* Simmons, the Secretary of the Interior held, October 4, 1887, that a set-

tlement right defeats the claim of a Railroad Co. to land within its grant,

"though such [settlement] right was subsequently abandoned without legal assertion." (6 Land Dec., 172.)

And the same rule should apply to *indemnity* lands, especially under the acts of Congress to meet such cases.

THE CONCLUSION is that settlement rights *initiated*, not abandoned, though non-perfected, are to be protected.

VI. *The rights of* ALL *these settlers are saved to them* by the Acts of April 21, 1876 (19 Stat., 35), May 14, 1880 (21 Stat., 140), June 15, 1880 (21 Stat., 237), March 3, 1887 (24 Stat., 556), and to protect them the United States will by bill in equity secure the cancellation of patents improperly issued. (U. S. *vs.* M., K. & T. Co., 141 U. S., 381.)

1. These Acts were passed to meet *these identical cases* and others of similar character. (See Anderson's Report No. 1619, 49th Congress, 1st Sess., April 10, 1886, cited *ante*, p. 14; Senate Ex. Doc. No. 194, 50th Cong., 1st Sess., parts one and two; Senate Ex. Doc. No. 124, 49th Cong., 2d Sess.

Ryan *vs.* Central Pacific R. R. Co., 99 U. S., 386. [St. Paul R. R. Co. *vs.* Winona R. R. Co., 112 U. S., 730. Copp L. O., vol. 11, pp. 219, 314; Emerson *vs.* Central Pacific R. R., vol. 3, Sec'y Decisions, 117; Id., 166; Id., 227; Id., 490; Id., 305; K. P. R. R. Co. *vs.* Dunmeyer, 113 U. S., 629; 19 Opinions Atty. Genl., 68, as to Act 1887.

All persons who are within the *equity* of *any* of these statutes, should be protected whether within their words or not.

2. These statutes are to be *liberally construed* in favor of settlers. (Clements *vs.* Warner, 24 How., 394; Lytle *vs.* Arkansas, 22 How., 193, 208, 209.)

They are in *pari materia*, and to be *construed together*. They

(1) RATIFY all former irregular or unperfected *attempts* to secure homestead and pre-emption entries:

(2) They *continue* and *maintain* a SUBSISTING RIGHT in the settlers to secure the lands, by NEW ENTRIES *after* the *illegal patents* shall be canceled;

(3) They *relieve all laches*, and put the settlers in legal standing to secure their rights; and

(4) They properly treat *these lands* as RESERVED from indemnity selection by the Act of 1863, thus confirming the opinion of Harlan, J., in 141 U. S., above cited.

3. As to the Act of June 15, 1880 (21 Stat., 237), the Secretary of the Interior held, June 3, 1882:

"The act * * * specifically grants the right of purchase in all cases where the land was properly subject to the original entry. * * *

"A purchase can be made *after cancellation*" (1 Land Dec., 83).

Again in Mitchell's case (1 Land Dec., 126), Held, by the Commissioner of the General Law Office as to Act of June 15, 1880:

"The operation of this act is not affected by the cancellation of an entry."

These acts were all designed in behalf of settlers to *waive* any *failure* or *irregularity* in perfecting entries. Under the Act of 1887, it is held that a homestead entry:

"Erroneously canceled * * * though the judgment of cancellation was rendered in accordance with the ruling of the Department then in force,"

should be reinstated. (Darcy *vs.* Northern Pacific R., 17 Land Dec., 265, Sept., 1893; Northern Pacific *vs.* Mead, 16 Land Dec., 488; Northern P. R. *vs.* Smalley, 15 Land Dec., 36.)

In Wilcox *vs.* Jackson, 13 Pet., 498, it is said:

"Whenever a tract of land shall have once been legally appropriated to *any purpose*, from that MOMENT the land thus appropriated becomes severed from the mass of public lands, and that no subsequent *law* or *proclamation* or *sale* would be construed to embrace or to operate upon it, although no reservations were made of it."

In Harris *vs.* Northern Pacific Railroad, 10 Land Dec., 264, it was decided, March 4, 1890, that:

1. "Land covered by a claim, *resting on settlement, improvement* and occupancy, and existing *at date of withdrawal* on general route is excepted from the operation of such withdrawal.

2. "The *abandonment* of land by a homesteader under a decision of the local land office that the company had a better right *thereto*, is not the 'voluntary abandonment' that precludes reinstatement of the entry under section 3 of the Act of March 3, 1887." (See Gale *vs.* Northern Pacific R., 10 Land Dec., 307; Pacific R. *vs.* Walden, 7 Land Dec., 182; Southern Pacific R. *vs.* Stocks, 14 Land Dec., 192, 194; U. P. Ry. *vs.* McKinley, 14 Land Dec., 237; Fletcher *vs.* Brereton, 14 Land Dec., 554, 556; Franklin *vs.* Murch, 10 Land Dec., 582.)

In Roeschlaub *vs.* Union Pacific R., 6 Land Dec., 750, June 1, 1888, the Secretary of the Interior held, under the Act of 1887:

"A homestead entry of record at the date of definite location excepts the land covered thereby from the operation of the grant, although it may appear that at said date the settler had *abandoned* the land covered by his entry."

In Parker *vs.* Northern Pacific R., 8 Land Dec., 324, March, 1889, it was—

"Held: The relinquishment of an entry on receipt of notice from the local land office that it had been suspended under Departmental direction, on account of conflict with a railroad grant, is not such a 'voluntary' abandonment as will bar a reinstatement under the Act of March 3, 1887."

In the case of Michael Donovan, 8 Land Dec., 382, April, 1889, *Held:*

"A judicial decree awarding possession of the land to such purchaser [a purchaser under a Railroad Co. of indemnity land] as against the settler, is not such an adjudication as will preclude the Department from taking jurisdiction under said Act"

of March 3, 1887.

The case of Kimberland *vs.* Northern Pacific R., 8 Land Dec., 318, 321, *holds:*

"That a final decision of a former or the present Secretary is not only no longer a bar to the further consideration of the question decided, but it is made the duty of the Secretary to *readjudicate the case.*"

THIS saves the settlers now in this Court.

> Blodgett *vs.* Central Pacific R. R., 6 Land Dec., 309; Elwell *vs.* Northern Pacific R. R., 5 Land Dec., 566.

4. The Commissioner of the General Land Office has made the demand required by the Act of March 3, 1887 (24 Stat., 556), of the M., K. & T. Ry. Co., for a surrender of the patents issued to it, with a view after cancellation thereof to give settlers their rights. (See letter, February 17, 1893, to President M., K. & T. Ry. Co. APPENDIX D, this brief.)

VII. *The settlers are not in* LACHES *under these* statutes because it is held that the General Land Office will neither (1) *receive proof*, nor (2) issue patents to settlers, until the cloud upon the title made by the illegal

patents are canceled, to secure which the case is now pending in the U. S. Circuit Court in the District of Kansas.

Under the Act of March 3, 1887 (24 Stat., 556), the Attorney-General, in an opinion, November 17, 1887, to the Secretary of the Interior, held that the right to issue patents under the fourth section of said act does not arise until the land shall have been legally determined to belong to the United States. (Copp's Land Owner, Dec. 15, 1887, vol. xiv, p. 214; 6 Int. Dept. Land Dec., 272, 276.)

The same has been held under the Act of April 21, 1876. (Wisconsin Central R. R. *vs.* Stinka, Secretary Lamar, Jan. 25, 1886, 4 Land Dec., 344; Wisconsin Central R. R. case, June, 1888; Int. Dept. and Land Dec., p. —. See 2 Op. Atty. Gen'l, 41; 5 Op., 7; Streeter *vs.* M., K. & T. Co., Feb'y 7, 1878, Schurz, Sec'y Int., Rep. 1878, Part 1, p. 63.

THE DUTY OF THE UNITED STATES TO SETTLERS.

The United States, even without the aid of a statute, can, and, to protect the rights of settlers, is under obligation by bill in equity to procure the cancellation of patents improperly issued. (U. S. *vs.* M., K. & T. Co., 141; U. S., 358, 381.) And this duty is emphasized by the several acts of Congress protecting the rights of settlers.

THE EVIDENCE AS TO HOMESTEAD AND PRE-EMPTION SETTLEMENTS.

This is found in the printed records—is brief—and it is unnecessary to repeat it here.

THE OPINIONS OF THE SUPREME COURT OF KANSAS.

They are remarkable for what they *omit* to say as well as for what they *do say*.

I. They ignore and in effect overrule the case of M. K. & T. Ry. Co. *vs.* Noyes, 25 Kas., 340; taken in connection with the Acts of 1876, 1880 and 1887.

II. They fail to answer the able and unanswerable opinion of Stillwell, J., in the District Court of Kansas, in Burnham *vs.* Starkey. ☞A printed copy is herewith filed.

III. They ignore the Acts of Congress of April 21, 1876 (19 Stat., 35); May 4, 1880 (21 Stat., 140); June 15, 1880 (21 Stat., 237), and March 3, 1887 (21 Stat., 556), passed to meet *these* and *similar cases*.

The settled doctrine *now* is that where a settler's claim was *initiated* before the withdrawal of lands, it is protected by the Act of 1866. It was so decided by the Secretary of the Interior December 24, 1878, in the case of Justus W. Tremain as to W.½, N. E.¼, Sec. 6, T. 26, R. 21, Kansas, claimed by the M., K. & T. Ry. Co. His application was rejected by the Secretary, but was afterward reinstated on the authority of Ryan *vs.* Central Pacific R. R., 100 U. S., 382, and P. H. Blodgett *vs.* C. & O. R. R. Co. (6 Copp, L. O., 37).

It is enough, however, if his claim was initiated *before indemnity* selection.

IV. The opinions of the Kansas Court are so *brief* as to leave the fair inference that they were not fully considered.

V. The judgments of the Kansas Court do not conclude any right of a settler in the General Land Office.

Kimberland *vs.* Northern Pacific R. R., 8 Land Dec., 318.

No. 141. THE CASE OF ARD *vs.* BRANDON, 43 KAS., 425.

This was an *odd*-section case.

The opinion in that case says:

"In view of the recent decision of Burnham *vs.* Starkey (41 Kas., 604, and Ard *vs.* Pratt, just decided, 43 Kas., 419), but little need be said."

And but *little* was said in any of the cases.

I. THE CASE OF *Burnham vs. Starkey* DOES NOT SUSTAIN THE OPINION IN ARD *vs.* BRANDON.

1. The Burnham case related to land in an *even-numbered* section, and the Court relied on the opinion of Brewer, Judge, in case of U. S. *vs.* M., K. & T. Ry. Co., 37 Fed. Reporter, 68, October 31, 1888, holding the patents for *such* even sections valid. The decree of Judge Brewer was on appeal reversed by the Supreme Court, 141 U. S., 358, as to *even* sections in granted limits, and the opinion more than intimates that *odd sections* in indemnity limits, as *these lands are*, "were excluded" from indemnity selection. If this had been before the Kansas Court the decision must have been different from what it was.

2. In Burnham *vs.* Starkey the Kansas Court referred to the Brewster case, 118 U. S., 682, as to certain *odd* sections. But that case related to rights held to be acquired by the M., K. & T. Co. from the Atchison, Topeka and Santa Fe Co., about which no question is made on the record in this case. And as shown above, the case in 141 U. S., 358, holds the odd sections not liable to indemnity selection.

3. In Ard *vs.* Brandon, the Kansas Court omitted to notice that Brandon claimed under the *Governor's* void patent, while in Burnham *vs.* Starkey the claim was under a patent from the United States.

II. *The opinion in Ard vs. Pratt* is itself erroneous and so gives no support *to the decision* in Ard *vs.* Brandon, because,

1. The Pratt case was on a patent issued by the

United States, the Brandon case was on a void patent issued by the *Governor*.

2. The Kansas Court strangely, erroneously, and as it would seem without an examination or knowledge of the acts of Congress, say:

"To overcome the title conveyed by the patent, Ard must have shown that the land was not only subject to homestead or pre-emption, *but that he had fully complied with* ALL *the requirements of either the homestead or the pre-emption law*. Upon the hearing or contest over the land, the decision upon the facts of the case was against Ard. It was then determined that he had not complied with the provisions of the pre-emption law."

This position has been *so fully answered* already that it is unnecessary to repeat it. It is certain:

(1) The Government *has waived* his laches, if any.

(2) Congress by acts referred to above *has protected* him.

(3) His failure to comply would *not give the* Railway Co. any right to the land.

III. In further support of Ard's claim it is to be said: he is protected by the Act of April 21, 1876 (19 Stat., 35), in addition to the other acts, because his *claim was initiated* before the withdrawal letter.

No. 142. THE CASE OF ARD VS. PRATT, 43 KAS., 419.

I. In this case the Kansas Court say:

"It does not appear that Ard *so complied* with either the pre-emption or homestead law as to obtain any legal or equitable claim to the land."

A sufficient answer is, the evidence shows that in view of the acts of Congress already referred to he *had acquired an equitable right* to secure the land.

II. The Court say:

"When he [Ard] made his pre-emption filing on the

14th of July, 1866, he accepted the advice of the register of the land office and utterly abandoned his intention of homesteading."

The evidence (Record p. 13) shows Ard testified:

"July 14, 1866, he went to U. S. land office * * and there made out a homestead application * * and tendered the application and the land office fees * * which were rejected on the [MISTAKEN] ground that (1) the land was situated within the granted limits of the L., L. & G. R. R., and (2) was double minimum lands and that he [the local officer] could not let me [Ard] homestead only 80 acres. Said register advised me [Ard] if I wanted said 160 acres that I could first make a pre-emption filing on 80 acres * * and pay for it within 12 months, and then I could homestead 80 acres more, and by that plan I could get 160 acres * * and that I could change a pre-emption filing at any time * * into a homestead; * * so I told said register as he would not allow my homestead, I would make a pre-emption claim."

He did so and paid the fee. (Record, 14.)

And yet the Court says he did not "so comply with either the pre-emption or homestead law as to obtain any legal or equitable right"!! He did all he could do—he *did* fulfill the law on his part.

The Register was *mistaken* when he said the land was in granted limits; mistaken when he said Ard could not homestead the whole 160 acres. He erred in law when he *denied* the *homestead* application. Ard never *abandoned* any right. He made a pre-emption claim on *mistaken* advice, and is now entitled to be *restored* to his homestead right.

Here were *accident* and *mistake*—proper heads of equitable jurisdiction for relief. The Acts of 1876, 1880 and 1887 were made to meet just such case.

It was in reference to this very claim that the Commissioner of the General Land Office, December 31,

1885, addressed a letter to the undersigned, in which he said :

"The W. ½, S. E. ¼, Sec. 2, Tp. 26 S., R. 20 E., is situated in the indemnity limits of both grants. The records show that Newton L. Ard filed D. S. No. 2115 for the tract, July 14, 1866, alleging settlement the same day. A hearing was had at the local office September 9, 1872, but before any action was taken by this office on the evidence adduced at the hearing, the tract was selected by the Mo., Kan. & Tex. Ry. Co., and patent issued for the same November 3, 1873; November 19, 1877, this office rejected the claim of Ard, and on appeal the Secretary refused to disturb that decision. * * * At the time of the hearing he (Ard) had a house and out-buildings on the land, and about 75 acres under fence and cultivation. It was *then* held *that the right of the company attached to indemnity lands* at the same time it did to granted lands, and it was held that his was not a legal pre-emption *at that date*. The Secretary in his decision cited the case of Moore *vs.* Robbins, 96 U. S., 530, as a precedent for the determination of Ard's rights in the courts. [8 Op. Att'y-Gen. 246.]

"Since his case was acted on by the Department, the Supreme Court of the United States has *placed a different construction upon the law* as to *when* a company's right to specific indemnity tracts attaches. Ryan *vs.* Central Pacific R. R. Co., 99 U. S., 386. [St. Paul R. R. Co. *vs.* Winona R. R. Co., 112 U. S., 730.] It was there held that a company's right to indemnity attaches to no specific tract until selection has been actually made. At the time the company selected the tract occupied by Ard [April 14, 1873], he had a dwelling and out-buildings on the land, and had under cultivation and fence about 75 acres of the land. His claim to the land antedates the grant to said company, and his right thereto was paramount; it did not therefore fall within the provisions of said grant. He was in laches, but for that reason alone the company's right could not vest. That was a question between the Government and himself, in which the company should have no voice [Copp. L. O., Vol. 11, pp. 219, 314; Emerson *vs.*

Central Pacific R. R., Vol. 3, Sec'y Decisions, 117; *Id.*, 166; *Id.*, 227; *Id.*, 490; *Id.*, 305; K. P. R. R. Co. *vs.* Dunmeyer, 113 U. S., 629], for at the date of selection he had valuable improvements on the land, and was in actual possession thereof—and it was no longer public land, and subject to such selection."

No. 143. The case of Wood vs. Beach, 43 Kas.

The opinion of the Kansas Court says:

I. "Even if the withdrawals of the land in the indemnity strip * * were not FULLY authorized by the statute, so long as the order of withdrawal was actually in force it *probably* was sufficient to defeat any settlement for pre-emption or homestead."

The withdrawal in Woolsey *vs.* Chapman, 101 U. S., 755, was authorized by statute. The Court said of the withdrawal in that case:

"It was * * such a proclamation * * reserving the lands from sale as was contemplated by the act."

The effect is that where as in these cases there is no statutory authority there can be no lawful withdrawal.

The Kansas Court refers to withdrawals "not FULLY authorized." Could they be *partly authorized* and partly not? But the court resolves its part *against* the settlers.

It is a sufficient answer to say:

It has been shown that as to these indemnity lands—in fact, *all* the lands—the withdrawals were *fully unauthorized*.

There was an absolute want of power—no jurisdiction to withdraw.

But if only irregular the settlers are entitled to be *restored* to their rights.

II. The opinion says, as to Wood's claim:

"When Wood, in 1870, made his application * * * to file upon the land, he was informed that the land had been withdrawn and his application was rejected. Subsequently he renewed his application to the local and officers, *but otherwise* ACQUIESCED in the ruling of the local land officers. He never appealed to the Land Department at Washington."

The evidence is (Record p. 10) that Wood settled with the intention of making a homestead; that he made the application, but was rejected because of the withdrawal letters from the General Land Office; "that SEVERAL TIMES after * * * he made similar applications" and continued on the land until he died.

And that is called "acquiescence" in the rejection of his claim!

He never acquiesced.

The Court:

1. Ignored the fact that the Governor's patent was void;

2. Ignored the Acts of Congress of 1876, 1880 and 1887;

3. Overlooked Wood's "*several times*" application.

It is sufficient to say:

1. The evidence proves a homestead application *persisted in*, never abandoned;

2. The law as shown protects it;

3. The Court says as to Wood, the applicant:

"He never appealed to the Land Department at Washington. One of the duties of that Department in cases relating to the public lands is to correct the errors of law and of fact committed in the local land offices when properly brought to its attention." (Krichbaum *vs.* Perry, 5 Land Decisions, 403; Burnham *vs.* Starkey, 41 Kas., 604, and of Ard *vs.* Pratt just decided.)

The answer is, Wood was not *bound to appeal*. The

local land officers refused to permit anything to be done, but they could not nullify his rights.

His rights were saved by the Act of March 3, 1887 (24 Stat., 556).

This is decided in principle in Orr *vs.* Central Pacific R. R., 12 Land Dec., 272, 274, March 20, 1891, the syallabus of which says :

"The doctrine of *res judicata* [a former rejection] will not prevent the Secretary of the Interior from considering an application to enter, finally rejected by his predecessor, if such matter comes within Section 3, Act of March 3, 1887, which makes it the duty of the Secretary to *reinstate the settler in all his rights* to lands upon which he may have settled, and for which his *application was erroneously rejected* on account of a railroad grant, if such settler has not abandoned the land and located another claim in lieu thereof." (Harris *vs.* Northern Pacific R. R., 10 Land Dec., 264; Gales *vs.* Northern Pacific, 10 Land Dec., 307.)

And in Holm *vs.* St. Paul, M. & M. Ry. Co., 14 Land Dec., 657, it is said :

"And as to whether Krom *complied with the law* or not, *is a question between him and the Government*, and one which can be of no interest to the [Railway] company. (Kansas Pacific Ry. *vs.* Dunmeyer, 113 U. S., 629; 12 Land Dec., 232.)

4. The opinion of the Kansas Court says : "It does not appear that he [Wood] tendered the fees."

It is shown above that he was not bound to do the vain act to tender fees when his right to make a filing was denied by the local officers.

NO. 144. THE CASE OF MADDOX VS. BURNHAM, 43 KAS.

This case was decided in a few brief words on the authority of Burnham *vs.* Starkey (41 Kas., 604). This opinion, like the others, overlooks the Acts of 1876, 1880 and 1887. It lays stress on the illegal withdrawals

from entry, to which a sufficient answer has already been given. It overlooks the fact that Maddox's claim was *initiated prior* to the withdrawal letter of 1867.

The *evidence* in the record *abundantly* proves the right to a homestead. The findings of fact by Stilwell, J., prove it.

In the foregoing, SOME REPETITION has been unavoidable; some has been deemed proper in view of the connection in which it is found.

The importance of these cases—it is hoped—will be deemed a sufficient justification for the length of the argument.

Respectfully submitted,

WILLIAM LAWRENCE,
Attorney for the Plaintiffs in Error.

BELLEFONTAINE, OHIO,
November, 1894.

APPENDIX A.

UNITED STATES ATTORNEY'S OFFICE,
DISTRICT OF KANSAS,
TOPEKA, KANSAS, September 13, 1894.

NEWTON L. ARD, ESQ., *Elsmore, Kas.*

DEAR SIR: I have read the letter addressed to you by Judge William Lawrence, under date of August 6, 1894, in reference to your case now pending in the Supreme Court of the United States, involving the north half of the northeast quarter of section 11, town. 26, range 20, and the west half of the southeast quarter of section 2, town. 26, range 20.

This land is involved in the pending suit of the United States *vs.* The Missouri, Kansas and Texas Railway Company *et al.*, and the patent thereto issued by the Government to the railroad company is sought to be annulled for the reason, among others, that you settled thereon under the pre-emption law in July, 1866, that date being prior to the filing of the map of definite location of its line of road by said railroad company. This suit of United States *vs.* The M., K. & T. Railway Co. is now at issue, and testimony has been taken therein in reference to the land above described, and in my judgment that testimony will require the court, within the principle of the decision of the Supreme Court in the same case, to vacate the railroad patent. There is no doubt that the question as to the

validity of this patent has never before been squarely raised, nor do I see any way in which it could be raised except in a suit at the instance of the Government. It seems to me that a decision in any suit between yourself and the railway company or its grantee, would not affect your right under the public land laws, and that such decision, if possible, should be postponed until after the hearing and decree in the suit of the United States above adverted to. I return Judge Lawrence's letter.

Very respectfully,

W. C. PERRY,
United States Attorney.

EXTRACT.

FORT SCOTT, September 21, 1894.

HON. WM. LAWRENCE:

* * * * * * * * *

While I did not include the other cases of a similar nature, in terms, the letter [September 13, 1894] in spirit applies to those not named, as well as the one which is * * .

W. C. PERRY,
United States Attorney.

APPENDIX B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., May 4, 1886.

MESSRS. BRITTON & GRAY,
Attorneys M., K. and T. Ry. Co.,
Washington, D. C.

GENTLEMEN: The W. ½, S. E. ¼, Sec. 2, Tp. 26 S., R. 20 E., Independence District, Kansas, is situated in the indemnity limits of the grant to the Missouri, Kansas and Texas Railway Company. The map of the definite location of the Company's road opposite this tract was received in this office with the letter of the Secretary of the Interior of February 19, 1867, accepting the same, and directing action thereon. This office on the 19th of March, 1867, instructed the local officers to reserve from sale, location or entry of any kind except in case of bona fide pre-emptions initiated prior to withdrawal, all the *odd*-numbered sections within the 10-mile limits, *all* the vacant lands between the 10- and 20-mile limits.

The letter directing that withdrawal was received at the local office the 3d of April, 1867.

The records of this office show that Newton L. Ard filed D. S. No. 2115 for the tract July 14, 1866, alleging settlement the same day.

He makes oath that his application to perfect his claim was presented at the local office within one year, but rejected on account of his house being called a rail pen.

He subsequently applied to make proofs and payment, and hearing was had at the local office Sept. 9, 1872, when he submitted proofs which show that he initiated his claim in June, 1866, but, being a single man, he did not immediately establish his actual residence on the land; yet he continued to improve it with the intention of making it his home, and enter-

ing it. He completed a claim house on the land in the spring of 1867, and enclosed with a fence 4 acres.

At the time of the hearing he had about 75 acres under fence and cultivation, and resided there continuously from the completion of his house in the spring of 1867. He had 160 rods of growing hedge, orchards, 1,000 peach trees, log stable, corn crib and a new house on the land at the time of the hearing.

For some reason, unexplained, this office took no action in the case until Nov. 19, 1877, when it rejected his application. In the meantime the Company selected the tract April 14, 1873, and patent issued for same Nov. 3, 1873.

On appeal, the Secretary, Nov. 5, 1878, directed that the decision of this office be permitted to stand.

Sept. 17, 1879, the application of Mr. Ard for a rehearing was submitted to the Secretary, and Sept. 20, 1879, the Secretary refused to re-open the case.

The Hon. Wm. Lawrence on the 31st ult. filed in this office several affidavits which show that Mr. Ard is still residing on the land with his wife and five children, and that he has continuously resided there and cultivated and improved the land to the present time.

In view of all the facts, particularly that Mr. Ard's claim was initiated prior to the date of the grant, and that his actual settlement on the land antedates the withdrawal, and the earnings of his labor for so long a time are concentrated on this land, his home, I respectfully ask that you request the Company to reconvey to the United States all its right, title and interest in the premises, and obtain a patent to the land, without further litigation.

In compliance with the request of Mr. Lawrence I enclose herewith his notice of the filing of his motion and argument in the premises.

Very respectfully,

WM. A. J. SPARKS,
Commissioner.

APPENDIX C.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., July 6, 1886.

HON. WILLIAM LAWRENCE, *Bellefontaine, Ohio.*

SIR: For further reply to your letter of the 25th ult., addressed to the Honorable Secretary of the Interior, I have to state that by office letter of May 4, 1886, the Mo., Kans. and Tex. Ry. Co. was requested to reconvey to the United States the W.½, S. E.¼, Sec. 2, Tp. 26 S., R. 25 E., Kansas, included in the claim of Newton L. Ard.

The Company has not as yet responded, and no further action has been taken by this office.

The Attorney-General has instructed the United States Attorney (W. C. Perry, Esq., Topeka, Kansas) to bring suit to set aside patents to said

Company, for the even-numbered sections in Allen County, Kansas, as recommended by this office.

The land claimed by Mr. Ard is included in that list, and pending the result of that suit this office does not feel authorized to take any further action in the premises. Very respectfully,

S. M. STOCKSLAGER,
Ass't Commissioner.

APPENDIX D.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., February 17, 1893.

HENRY C. ROUSE,
President of the M., K. & T. Railway Company,
New York City, New York.

SIR: At the request of the Honorable Attorney-General, and by direction of the Honorable Secretary of the Interior, demand is hereby made for the reconveyance to the United States of the lands described in the lists hereto attached, which were patented to the Missouri, Kansas and Texas Railway Company, without authority of law, for indemnity purposes, being situated within the limits of the grants to the following named companies, to wit: Leavenworth, Lawrence and Galveston R. R. Co., Atchison, Topeka and Santa Fe Railroad Company, and the Union Pacific Railway Company within the State of Kansas.

The United States District Attorney for the State of Kansas reports that T. N. Sedgwick, Esq., the general attorney for the Company, has agreed to waive the formality of a demand for such lands as it is desired to include in the suit, now pending, to obviate delay for ninety days, that the amended bill may be filed by the first Monday in March, but, under the rulings of the Department, it is essential that demand be made upon some officer of the Company.

It is therefore suggested, if the Company decide to refuse to recovery, that it do so at once, and not wait the expiration of ninety days allowed by the Act of March 3, 1887, and that, in its answer, for refusal to comply, waive any right to further response to the demand within ninety days, and thus facilitate the progress of the suit.

Very respectfully,
W. M. STONE,
Commissioner.

SCHEDULE OF PAPERS ANNEXED.

Lands in overlapping indemnity limits of grants to L., L. & G. and M., K. & T. Co.'s, patented to the latter.

LIST "B."

	*	*	*	*	*		
	S.	*T.*		*R.*	*Acres.*		
S. W.¼ N. E.¼ &	2	26		20	80.00	Pat. April 23, 1877.	
S. E.¼ N. W.¼ &	"	"		"			
S. E.¼ N. E.¼	"	"		"	40.00	"	" " "
E.½ S. E.¼	"	"		"	80.00	"	Nov. 3, 1873.
All	24	25		20	640.00		"

☞ All the foregoing letters are duly certified by the Commissioner of the General Land Office, and the certified copies are on file in these cases.

Q. There was no improvements on the land?

A. No, sir; none, except in one little grove there was about a half a dozen rails that had been made by somebody, and I found out afterwards that a man had made the rails and it was not Mr. Sprague that made them.

(Here the plaintiff objects as hearsay, and the witness contiues:)

It is not hearsay. I found that a man by the name of Butler made them, for he told me so.

Q. What was the value of the land at the time that you went on there?

A. It was wild land, worth about a dollar and a quarter an acre.

Q. What is it now worth, considering the improvements—Mattox' first and then your own?

A. I should think it would be worth twenty to twenty-five dollars and acre.

Q. At the time that the railroad lands were being selected by the railroad company were you living there at that time?

A. Yes, sir.

Q. Did the parties who were attending to the duties as to selecting the lands camp close to you?

A. Yes, sir; they camped on the quarter of land right south of me that Mr. Englehart owns now, and they were at my house at different times.

Q. Were they at Mr. Mattox's?

A. Yes, sir.

Q. How far are you from his place?

A. About three-quarters of a mile.

Q. There were houses building on both tracts of the land then?

A. We had buildings on both of them then.

Q. And farming?

A. Yes, sir; we were farming.

Q. Calling your attention to the year 1875, to revert back, I will ask you if the country was not considerably settled up at that time?

A. Yes, sir; it was.

Q. I will ask you how your — lays with relation to the public roads—both your land and Mattox's?

A. Well, — Mattox's land there is a road runs on the south and the east and a laid out State road and a country road on the south; on my land there is a country road runs on the south of my land and there is a township road on the half-section line on the
11 east side of my quarter; this section line and the line running down on the east side of the section was cut up considably by the creeks, and they put it on the half-section line.

Q. In 1875, I will ask you where Mr. Inglehart lived?

A. I did not know about him in 1875.

Q. Where in the year 1881 and the year before?

A. He lived on the section right south of me. I think that was on section 35, 25, 20.

Q. You were acquainted with him?

A. Slightly.

Q. There was no improvements on the land?

A. No, sir; none, except in one little grove there was about a half a dozen rails that had been made by somebody, and I found out afterwards that a man had made the rails and it was not Mr. Sprague that made them.

(Here the plaintiff objects as hearsay, and the witness contiues:)

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Q. Were they at Mr. Mattox's?

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A. I did not know about him in 1875.

Q. Where in the year 1881 and the year before?

A. He lived on the section right south of me. I think that was on section 35, 25, 20.

Q. You were acquainted with him?

A. Sligltly.

Q. Was you farming this land at the time?

A. Yes, sir.

Q. And he was farming his place?

A. Yes, sir.

Q. Was he on your place or about it at any time before the purchase of it in 1881?

A. Once or twice I believe I saw him on the place.

Q. Did you have any talk with him about it?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Did you ever see Mr. Brunham?

A. No, sir; never to know him in my life.

Q. Were those roads that you speak of roads that were traveled a great deal?

A. Yes, sir; they are traveled considerably. The road on the south side of my place is one of the main roads from Humboldt to Fort Scott and the one on the other side is one that is traveled by the neighbors—a neighborhood road.

Q. Were you at any time at the Government *at the Government* land office at Humbolt in company with Mr. Mattox?

A. Yes, sir.

Q. Was he with you the first time that you went down there?

A. No, sir.

Q. Did he go along with you the second time when Col. Goss was there?

A. Yes, sir; the first time that I went when Col. Goss was there.

Cross-examination by Mr. KEPLINGER:

Q. About how soon after you and Mr. Mattox settled that you first went to the land office?

A. We settled on our claims on Saturday evening and the next Monday I went to the land office.

Q. You did not both go there then?

A. No, sir.

Q. Why did he not go?

A. Well, Mr. Mattox, he and my son, they were on the claim. I don't know as he had any particular reason. He said that I could attend to both as well as one.

Q. Where was the land office then?

A. In the old Government building at Humboldt.

Q. What did you go there for?

A. To see if we could have the permission to put our cabins on the claims and live in them until the next spring before we made our homestead.

Q. When did you first go there? When did you next go there?

A. I don't think we went there any more from that time until the following March. As soon as we heard that a change was made in the land office we went to see about our homesteads.

Q. The first time that you went there you did not offer to file your homestead, but simply to inquire about it?

A. Yes.

Q. Did you both go the second time?

A. I was at the land office when we first came to this country.

12 Q. I mean the second time after your settlement?

—. ——.

Q. Where was the land office then?

A. In the old Government building yet.

Q. When was that?

A. I think that was in March, 1867.

Q. Do you remember what time in March it was?

A. I don't recollect exactly, but I think it was sometime about the middle of the month—somewhere along there.

Q. Who was the register at that time?

A. Watson Stewart.

Q. What took place then?

A. No; it was Col. Goss.

Q. Do you remember what took place then?

A. We stated our business to him and he stated that they was not homestead lands, and that there was no Government lands in Allen county then; that since we had been there first the lands had been drawn out of the market for the benefit of the railroad company.

Q. He notified you that there was a filing by Sprague on the land that you were on?

A. He did the last time.

Q. Did you learn when that homestead filing had been made?

A. I think it was made sometime in July—that year before '66.

Q. Did he tell you that it had been done—that it had been cancelled?

A. I seen the filing.

Q. When and where did you see it?

A. I saw it about four years ago, I think.

Q. Who had it?

A. It was in the hands of Martin first.

Q. What Martin was that?

A. It was Martin Markles.

Q. You saw a certificate showing that he had made a homestead filing on the land that you claimed?

A. Yes; that was some fifteen years after it was made.

Q. Was the man's name Pike Sprague?

A. I believe it was.

Q. Did that filing cover all you- land or part of it?

A. Part of it.

Q. Which part of it?

A. The east half.

Q. It covered the part that is in controversy between yourself and Mr. Englehart?

A. Yes, sir.

Q. You say that you know the time that the officers were around selecting the land. What officers do you refer to?

A. He was appraising the first time—the odd sections.

Q. Was it Cap. Hurd?

A. Yes; it was Cap. Hurd.

Q. What time was that?

A. I don't know as I can tell the year, but it seems to run in my mind that it was in the spring of the year; maybe it was in the fall, but I could not say.

Q. Fix it as near as you can what year it was.

A. Well, I don't know as I can fix the year.

Q. Now, then, you speak of his selecting the lands. Do you mean that, or "appraising"?

A. He was simply appraising the lands and running the lines, and he had a camp down in a grove on Mr. Inglehart's place, and we would go down to his encampments frequently of nights and talk with him.

13 By Mr. FOUST:

Q. I desire to ask you if at the time you were there in company with Mr. Mattox whether Mr. Goss said anything to you — your remaining on the land.

(Objected to as incom., irrel. Overruled. Exception.)

A. He told us that we could remain on the lands, and he said he did not think it would injure us at all any.

Q. What else did he say, if you remember?

A. Well, I don't know but that was about all that he said. He said he did not think it would interrupt us any, and he claimed that the railroad limits would not hurt us any. At that time we understood in that neighborhood that the indemnity land was taken only to make up the deficiency made in the grant proper, and the idea was whenever they lost a piece in the grant proper—well, they had the privilege of taking it out of the lands nearest where it was lost, and that was the same understanding that Cap. Hurd gave us at the time that they were appraising the land, and he said that he did not think that they would reach us.

(To this testimony Mr. Keplinger objects as before. Overruled. Exception.)

WM. MATTOX sworn.

Direct by Mr. FOUST:

Q. What was it that you wished to state?

A. Cap. Hurd told us (here plaintiff objects) to remain on there and we would be protected in our lands.

Cross by Mr. KEPLINGER:

Q. Why did you not make the homestead entry when you first went there in the fall?

A. Well, sir, the reason is this: We did not have money enough to do it and we were in a new country and a strange country and we did not know whether we would get anything to do.

Q. Do you remember how much money you had at the time?

A. About thirteen dollars—both of us—between us.

Q. Why, wasn't feed cheap? What were they charging for it at that time?

A. No, sir; next spring I got 32 bushels of corn and I paid $72.00 for it.

By Mr. FOUST:

Q. You have heard Mr. Starkie's evidence?

A. Yes, sir.

Q. You were with him at the land office—with him at the same time that he speaks of when Col. Goss was the register?

A. Yes, sir.

Q. In the spring of '77?

A. Yes, sir; in the spring. I don't know what time it was, but it was in the spring.

Q. Did Col. Goss inform you at that time there was some talk of withdrawing the land?

A. He said that the lands had been withdrawn and advised us to stay right on the land. He said it would be outside when they took their quota of land; he was positive of it.

By Mr. KEPLINGER:

Q. You understood that they would get full quota of in-
14 demnity without reaching you?

A. He said that we would be outside of the indemnity limits. I understood that we were further out then than them when they took their quota.

(The testimony of this witness, by agreement, is to be substantially the same as the witness Starkey, the witness preceding this one, and the witness dismissed.)

STATE OF KANSAS, }
County of Wilson, } *ss:*

I, Jesse F. Shinn, stenographer of the 7th judicial district, Kansas, hereby certify that the above and foregoing is a true, full, and complete transcript of the evidence given on the trial of the above-entitled cause.

Witness my hand at Fredonia, Kansas, this 6th day of September, A. D. 1886.

JESSE F. SHINN,
Stenographer.

And the court, upon consideration of the testimony of said witnesses introduced by defendants, made the following findings of fact in addition to those agreed upon by the parties:

1st. That immediately after settling on the land claimed by him,

to wit, Oct. 22, 1866, defendant Maddox caused and procured his father-in-law, C. S. Starkey, who occupied the same relation to another piece of land that this defendant did to the land in controversy claimed by him, to go to the Government land office at Humboldt, Kansas, within whose jurisdiction said land was situated, for the purpose of ascertaining from the local land officers if said land was subject to homestead entry, with the *bona fide* intention, if said land was subject to entry, to erect a house on said land, make his permanent residence there, and enter the same the succeeding spring.

The said Starkey went to said land office, both on his own account, with reference to the tract he had settled upon, and also on account of the defendant Maddox.

Said Starkey communicated the foregoing intentions of defendant Maddox to Watson Stewart, who was then the duly acting register of said land office and attending to the duties thereof, and said Stewart told said Starkie in substance that defendant Maddox could build his house on the land and live on it and he could enter it.

The defendant Maddox, being informed of this, remained on the land and continued to reside there and make improvements thereon.

Also defendant Starkey, immediately after going on the lands claimed by him, to wit, October 22, 1866, went to the Government land office at Humboldt, Kansas (within whose jurisdiction the land in controversy is situated), for the purpose of ascertaining from the local land officers if said land was subject to homestead entry, with the *bona fide* intention, if said land was subject to entry, to erect a house on said land, make his permanent residence there, and enter the same the following spring. The defendant communicated his intention to Watson Stewart, who was then and there
15 the duly acting register of said land office and attending to the duties thereof, and said Stewart told defendant in substance to build his house on the land and live on it and he could enter it.

The defendant thereupon went back to the land and continued to reside on it and made permanent and substantial improvements thereon.

Second. Subsequently, in March, 1867, both defendants went to said land office again for the purpose of making their homestead entries of the said lands occupied by them respectively, and the then register of the land office told them they could not homestead the land, assigning as the only reason for his refusal that the land had been withdrawn from market for the benefit of the Missouri, Kansas and Texas Railway Company; that it was not homestead -and, and that there was no public land in Allen county.

He, however, told defendants to remain on the land; that it would be outside of the railroad land after they got their quota.

The defendants thereupon went back to the land and have remained there ever since and made permanent and substantial improvements thereon.

Third. Ever since October 20, 1866, the defendants have been in

the open, actual, visible, and exclusive possession of the lands in controversy.

And from the foregoing facts as agreed upon by the parties and as found by the court the court deduced the following conclusions of law:

1st. The rights of defendants as homestead settlers attached to the lands in controversy Oct. 20th, 1866, and have never been waived or abandoned.

2nd. The action of the Commissioner of the General Land Office in withdrawing said land from homestead by his letter of March 19th, 1867, and the action of the local land officers in refusing to allow defendants to homestead said land were without authority of law and in violation of the rights of defendants.

3rd. The lands in controversy were included in the patent to the railroad company without authority of law and in violation of defendants' rights, and conveyed no title as against said defendants.

4th. The plaintiffs are not entitled to recover in this action.

And plaintiffs each severally excepted to the findings of the court and to the conclusions of law therefrom upon the ground that said findings and conclusions were contrary to the law and the evidence.

And, said exception being overruled, the plaintiffs each moved separately for judgment in his favor upon the agreed statement and upon the facts as found by the court; which motion the court overruled, and said defendants each separately excepted.

16 And thereupon, said causes coming further on to be heard upon separate motions of each of said plaintiffs filed in said actions respectively to set aside its findings of fact and conclusions of law and grant a new trial upon the grounds that said findings were contrary to the evidence and said conclusions contrary to law, and on account of errors of law in the admission of evidence; which motion the court overruled; to which ruling the plaintiffs each severally excepted.

And thereupon the court, upon motion of the defendants, rendered judgment in each of said causes, as fully appears by reference to journal entry, of which the following is a copy, omitting caption and title:

And now comes said cause further on to be heard, the plaintiff appearing by L. W. Keplinger, his attorney, and the defendant appearing by Knight & Foust, his attorney-, and, a trial by jury being waived and said cause coming on to be tried by the court, *and* the court, upon consideration of the evidence, does find for the defendant and does consider, order, and adjudge that defendant go without day and recover of plaintiff his costs, taxed at $8——.

And thereupon and on the same day said cause com*ing* further on to be heard upon motion of plaintiff for judgment in his favor upon the agreed facts and upon the facts found by the court; which motion the court overruled; to which the plaintiff excepted.

And thereupon and on the same day said cause com*ing* further on to be heard upon motion of the plaintiff filed in said cause for a

new trial; which motion the court overruled; to which ruling the plaintiff duly excepted.

And for good cause shown plaintiff is allowed thirty days in which to make and serve a case for the supreme court, and defendant is allowed twenty days thereafter in which to suggest amendments thereto, said case to be settled on ten days' notice.

The journal entries in each of said causes, after caption and title, *was* of like tenor and effect.

The above and foregoing contains all the evidence introduced upon the trial of each of the foregoing cases, together with so much of the proceedings as is necessary to show the errors complained of.

Wherefore plaintiff presents the same and asks that it be settled, signed, and attested as a made case and filed as a part of the record in said causes.

And now, on this 8th day of March, 1887, the above-made case being submitted for settlement, and it appearing that due service of said case has been made on the plaintiff, and that no amendments were suggested, and that notice of the time and place has been waived, and that the same is true and correct made case, the same is by me allowed and ordered to be filed as a part of the record in each of said causes.

L. STILLWELL, *Judge.*

4487. N. Burnham *vs.* C. S. Starkey. Case made. 4488, 4489.
Filed Mar. 30, 1887.

C. J. BROWN,
Clerk Sup. Court.

17 And also on the 30th day of March, 1887, there was filed in the office of the clerk of the supreme court of the State of Kansas a waiver of the issuance and service of summons in error in the above-entitled cause, which is in the words and figures as follows, to wit:

18 4488.

In the Supreme Court of the State of Kansas.

CHARLES ENGLEHART, Plaintiff,
vs.
C. S. STARKEY, Defendant.

NELSON BURNHAM, Plaintiff,
vs.
C. S. STARKEY, Defendant.

NELSON BURNHAM, Plaintiff,
vs.
WM. MATTOX, Defendant.

The defendants in above-entitled causes waive issue and service of summons in above causes and enter appearance therein.

KNIGHT & FOUST,
Att'ys for Def'ts.

Of course "O K."

Messrs. K. & F.:

Please sign and return and I will reciprocate in all your cases.

L. W. K.

M'ch 14, '87.

4487. Burnham *vs.* Starkey. Burnham *vs.* Maddox. Engelhart *vs.* Starkey. Waiver of summons. Filed March 30, 1887. C. J. Brown, clerk supreme court.

19 And afterwards, on the 2nd day of April, 1889, the same being one of the regular judicial days of the January term, 1889, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and remains of record as follows, to wit:

N. Burnham, Plaintiff in Error,
vs.
William Maddox, Defendant in Error.

This cause comes on to be heard on the petition in error and the transcript of the record of the district court of Allen county, and thereupon said cause was submitted on brief of counsel for plaintiff in error and taken under advisement by the court.

The defendant in error is given twenty days within which to file brief.

20 And afterwards, on the 11th day of January, 1890, the same being one of the regular judicial days of the January term, 1890, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk, of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

Nelson Burnham, Plaintiff in Error,
vs.
William Maddox, Defendant in Error.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be reversed and that the cause be remanded with the direction to enter judgment upon the agreed statement of facts and the findings of the trial court in favor of the plaintiff and against the defendant on the authority of the opinion of this court rendered May 10th, 1889, in the case of N. Burnham *vs.* C. S. Starkey, 41 Kansas, 604. It is further ordered that the defendant in error herein pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

It is further ordered that the motion to with-old the judgment in this cause heretofore submitted herein be overruled.

21 4488.

And afterward, on the 2d day of April, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for the writ of error, which is in words and figures as follows, to wit:

THE UNITED STATES OF AMERICA:

To the honorable the chief justice of the State of Kansas:

Your petitioner, William Maddox, respectfully shows that on the 10th day of May, 1889, the supreme court of the State of Kansas rendered a final judgment against your petitioner in a certain cause wherein Nelson Burnham was the plaintiff in error, reversing in favor of the said Nelson Burnham and against your petitioner a judgment in the district court of Allen county, Kansas, for the recovery and possession of certain land, to wit, the S. W. ¼ of sec. 24, T. 25, R. 20, in Allen county, Kansas, as will appear by refer-ing to the record and proceedings in said cause, and that said supreme court of the State of Kansas is the highest court in said State in which a decision of the said suit could be had; and your petitioner claims the right to remove said judgment and proceedings to the Supreme Court of the United States by a writ of error under section No. 709 of the Revised Statutes of the United States, because in said suit your petitioner claims all his rights to the land in dispute under and by virtue of the laws of Congress in relation to homesteads and pre-emptions and the rulings and decisions of the proper offices thereunder, which rights have been decided against your petitioner by said supreme court of the State of Kansas in said cause; and your petitioner further alleges that the judg-

22 ment aforesaid is against his rights, under the facts as shown by said record, guaranteed to him by section 5 of the act of Congress approved March 3rd, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in construction of railroads and for the forfeiture of unearned lands, and for other purposes;" and your petitioner further shows that the issue and question involved in the trial of said cause are Federal in their nature and fall more particularly within the provision of the Federal courts and the proper officers of the Government of the United States.

Wherefore your petitioner prays the allowance of a writ of error, returnable into the Supreme Court of the United States, and for a citation.

WILLIAM LAWRENCE AND
A. L. ALLEN,
Attorneys for Petitioner.

Let the writ of error — upon the petitioner, William Maddox, entering into an undertaking to the said Nelson Burnham in the sum of $800.00, condition- as by law in such cases made and provided.

ALBERT H. HORTON,
Chief Justice of Kansas.

April 2d, 1890.

4488. Wm. Maddox *vs.* Nelson Burnham. Petition for writ of error. Filed April 2, 1890. C. J. Brown, clerk supreme court.

23 And afterward, on the 13th day of August, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond which, with all of the endorsements thereon, is in the words and figures as follows, to wit:

Know all men by these presents that we, William Maddox, as principal, and C. C. Thompson, John C. Teel, John Ard, David Ard, L. B. Davis, are held and firmly bound to Nelson Burnham in the full sum of eight hundred dollars, to be paid to the said Nelson Burnham, his attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of June, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the supreme court of the State of Kansas, in a suit pending in said court between Nelson Burnham, plaintiff in error, and William Maddox, defendant in error, judgment was rendered against the said William Maddox, and the said William Maddox having obtained a writ of error to the supreme court of Kansas to reverse the judgment in the aforesaid suit, and a citation directed to the said Nelson Burnham, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday in October next:

Now, the condition of the above obligation is such that if the said William Maddox shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and effect.

C. A. SMITH.
J. M. ALLENBAUGH.

W. M. MATTOX.
C. C. THOMPSON.
JOHN C. TEEL.
JOHN ARD.
DAVID ARD.
his
L. B. x DAVIS.
mark.

Witness- to mark:
M. P. JACOBY.
D. ARD.

24 STATE OF KANSAS, } ss:
County of Allen, }

John C. Teel, John Ard, David Ard, L. B. Davis, & C. C. Smith, being of lawful age and each being duly sworn according to law, each for himself says that he has property over and above all exemptions, debts, and liabilities of the value set after their respective names hereto subscribed as follows:

John C. Teel $300
John Ard 500
David Ard 500
C. A. Smith 200
his
L. B. x Davis 400
mark

Witness- to mark:
M. P. JACOBY.
DAVID ARD.

Subscribed and sworn to before me this 25th day of June, 1890, by —— Teel, John Ard, David Ard, C. A. Smith, and L. B. Davis.
[SEAL.] M. P. JACOBY,
Clerk Dist. Court, Allen Co., Kans.

IOLA, KANS., *June* 25, 1890.

I have examined the tax-rolls of 1889, *would* find C. C. Thompson pays tax on the E. ½ of S. E. ¼ and of sect. 4, 25, 21, and the N. W. ¼ of 10, 25, 21, and a personal tax on a valuation of $239 over and above exemption.

WM. CUNNINGHAM,
Treas. of Allen Co., Kans.

The above and foregoing bond approved this 13th day of August, 1890.

ALBERT H. HORTON,
Chief Justice of Supreme Court of Kansas.

STATE OF KANSAS, } *ss:*
Allen County, }

C. C. Thompson, being of lawful age, being duly sworn, deposes and says that he is a resident of Marmaton township, Allen county, Kansas, and is one of the sureties on the bond of Wm. Mattox, plaintiff in error, *vs.* Nelson Burnham, defendant in error, and that E. A. Barber has no judgment against him, and further states
25 that he never signed any bond in the case of Starkey *vs.* Burnham nor never signed any bond in those land cases except in the case of Mattocks *vs.* Nelson Burnham.

C. C. THOMPSON.

Subscribed and sworn to before me this 28th day of July, 1890.
N. L. ARD,
Justice of the Peace in and for Allen County, Kansas.

Property Statements of J. Mallenbau.

I have 240 — of land, worth $4,000, with mortgage of $1,200.
109 head of cattle, worth $1,500.
13 head of horses, worth 900.
39 head of hogs, 100.
Married man.

J. D. ALLENBAUGH.

Subscribed and sworn to before me this 11th day of August, 1890.

N. L. ARD,
Justice of the Peace in and for Allen County, Kansas.

MORAN, KANSAS, *August 11th*, 1890.

A. H. Horton, chief justice, Topeka, Kansas.

DEAR SIR: I received yours of the 8th inst. I have complied with your request today, with a sworn statement from J. Mallenbaugh. Hoping this will be satisfactory to you.

Yours truly, WM. M. MATTOCKS.

4488. Nelson Burnham *vs.* William Maddox. Appeal bond. Filed August 13, 1890. C. J. Brown, clerk supreme court.

26 4488.

And afterward, on the 20th day of November, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error, which is in the words and figures as follows, to wit:

4488.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State of Kansas, before you, between William Maddox and Nelson Burnham, a manifest error hath happened, to the great damage of the said William Maddox, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do demand you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

Witness the Honorable Melville Fuller, Chief Justice of the Supreme Court of the United States of America, this 20 day of November, A. D. 1890.

G. F. SHARITT, *Clerk.*

Allowed.

27 4488.

And afterwards, on the 31st of December, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation, which, with the endorsements thereon, is in the words and figures as follows, to wit:

Citation.

UNITED STATES OF AMERICA, *ss:*

To Nelson Burnham or his attorney of record, L. W. Keplinger, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in the city of Washington on the — day of ——, pursuant to the writ of error filed in the clerk's office of the supreme court of the State of Kansas, in a certain action, wherein Nelson Burnham is plaintiff in error and William Maddox is defendant in error, to show cause, if any there be, *and if* judgment in said writ of error mentioned shall not be corrected and speedy justice should not be had in that behalf.

Witness the Hon. Albert H. Horton, chief justice of the State of Kansas, this 23d day of December, 1890.

ALBERT H. HORTON,
Chief Justice of Supreme Court of Kansas.

I hereby acknowledge receipt of copy of above this 31 of Dec., 1890.

L. W. KEPLINGER,
Att'y for Nelson Burnham.

28 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in the above-entitled cause as the same remain on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas, affixed hereto at my office, in the city of Topeka, this 18th day of March, 1891.

C. J. BROWN,
Clerk Supreme Court.

Endorsed on cover: Case No. 14,602. Kansas supreme court. No. 144. William Maddox, plaintiff in error, *vs.* Nelson Burnham. Filed April 27, 1891.

JAN 3 1895
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

WILLIAM MADDOX,
PLAINTIFF IN ERROR,
vs.
NELSON BURNHAM.

No. 144.

In Error to the Supreme Court of the State of Kansas.

BRIEF FOR DEFENDANT IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
SIMON STERNE,
Attorneys for Defendant in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1894.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

WILLIAM MADDOX,
PLAINTIFF IN ERROR,
v.
NELSON BURNHAM.

No. 144.

In Error to the Supreme Court of the State of Kansas.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This was an action of ejectment brought by Burnham, defendant in error here, in the District Court of Allen County, Kansas, to recover from Starkey possession of the W. ½, S.E. ¼, Sec. 26, Tp. 25, R. 20 E., in said Allen County.

The land is situate within the common indemnity or twenty-mile limits of the Missouri, Kansas and Texas Railway (hereinafter styled M. K. & T.) under Congressional grant of July 26, 1866 (14 Stats., p. 289), and of the

Leavenworth, Lawrence and Galveston Railroad (hereinafter styled L. L. & G.) under Congressional grant of March 3, 1863 (12 Stats. 772).

By its order of March 19, 1867, the Interior Department reserved "from sale, location or entry of any kind, "except in case of *bona fide* pre-emptions initiated prior "to withdrawal, all the odd-numbered sections within the "ten-mile limits and *all the vacant lands between the ten* "*and twenty-mile limits.*"

It was selected by the M. K. & T. as indemnity on August 10, 1872, and said selection was approved by the Secretary of the Interior and patented to the M. K. & T. on November 3, 1873. Burnham holds the railroad title, having purchased same for a valuable consideration upon the faith of the Government patent.

The validity of the railroad patent is assailed by Starkey upon the following allegations of fact:

That on October 20, 1866, Starkey came to Kansas and settled upon this tract; that two days later he went to the Humboldt U. S. Land Office for purpose of inquiring from the Register whether the land was subject to homestead, and with the intention, if it was so subject, of taking up his residence thereon and of applying to enter it in the spring of 1867; that upon the affirmative reply of the Register he did take up his residence and improve said tract, and in March, 1867, he again went to the Land Office for the purpose of making his homestead entry on the land occupied by him, and the Register then told him that he could not homestead the land because it had been withdrawn and could only again become public lands in the event that it was not finally needed for the indemnification of the railroad grant; that thereupon Starkey went back to the land and has remained there ever since.

The District Court of Allen County rendered judgment

against Burnham, which judgment was reversed by the Supreme Court of Kansas upon the following grounds, as shown by the syllabus of the Opinion of the Court, 41 *Kansas Rep.* 604:

"1. *United States Patent, valid to what extent.* The "patent of the United States, issued the 3d of November, "1873, to the Missouri, Kansas and Texas Railway Com- "pany, to certain even-numbered sections of land in Allen "County, in this State, is valid, and sufficient to convey "all the lands described therein, unless persons claiming "particular tracts of these lands can clearly show prior "homestead or pre-emption settlements thereon before "any rights of the railway company attached.

"2. *Homestead right, when not acquired.* Where a "person, prior to 1867, settled in Allen County, in this "State, upon public land subject to homestead entry, but "neither made nor offered to make any entry or filing "thereon until the land was legally withdrawn from mar- "ket, under the act of July 26, 1866, granting lands to "the State of Kansas to aid in the construction of a "southern branch of the Union Pacific railway and tele- "graph from Fort Riley, Kansas, to Fort Smith, Arkan- "sas—now known as the Missouri, Kansas and Texas "Railway—such settler acquired no homestead claim or "other equity as against the title conveyed by the Gov- "ernment to the railway company on the 3d day of No- "vember, 1873, under said act.

"3. *Homestead claim, concluded by Acts of Applicant.* "Where a settler upon public land applies to the local "land office to enter the same under the provisions of "the homestead act as it existed prior to May 14, 1880, "but neither presents nor files the affidavit prescribed by "the statute, nor pays nor tenders the fee required in "such cases, and the land officers inform him that the "land has been withdrawn from market for the benefit of "a railroad company, under the act of Congress of July "26, 1866, and no appeal is taken by him from the re- "fusal of the local land officers to allow his entry, such "action of the applicant, and his failure to appeal, con-

" clude the rights he might otherwise have had at the " time.

" 4. *Legal title, Equitable Title Not overcoming.* " The facts in this case show no reason why the alleged " equitable claim of a settler upon a particular tract of " land now in dispute, patented to the Missouri, Kansas " & Texas Railway Company on November 3, 1873, should " prevail over the legal title."

ARGUMENT.

There is no question here as to exclusion from the grant because of the status of the land in controversy at date of the grant, nor even at date of definite location. The tract is part of an *even* section within the common indemnity limits of the M. K. & T. and of the L. L. & G. grants, and of the precise character of land which, according to the opinion of this Court in *U. S.* v. *M. K. & T. Ry.* (141 *U. S.* 374), " could have been legally selected " as indemnity lands for that company, if no right had " attached to them before their selection with the ap- " proval of the Secretary of the Interior." And ever since *Ryan* v. *Railroad Company* (99 *U. S.* 382) the doctrine has been repeatedly reaffirmed that indemnity selections are to be tested by the status of the land at the date of selection. Both place and indemnity lands equally look to the grant as their source or origin of title. They differ principally in method of identification—place lands being identified by definite location, whilst indemnity lands are further identified by selection.

Both are equally protected by a formal withdrawal. The effect of such withdrawal when resting exclusively upon an Executive order as a mere administrative measure for the protection of a grant has been frequently announced by decisions of this Court.

Grisar v. *McDowell*, 6 *Wall.* 381.

Wolcott v. *Des Moines*, 5 *Wall.* 681.
Wolsey v. *Chapman*, 101 *U. S.* 755.
Buttz v. *Northern Pac. R.R. Co.*, 119 *U. S.* 55.

But in the case at bar the withdrawal was by express direction of the 4th section of the Act of July 26, 1866 (14 Stats. 289), which provided—

"That as soon as said company shall file with the Sec-
" retary of the Interior maps of its line, designating the
" route thereof, it shall be the duty of said Secretary to
" withdraw from the market the lands granted by this
" Act in such manner as may be best calculated to effect
" the purposes of this Act and subserve the public
" interest."

It is entirely clear that this law would have worked a statutory reservation of the land whether the Secretary of the Interior had or had not issued his formal order of withdrawal.

The relevant question, then, is whether on March 19, 1867, when the order of withdrawal was made, any such right had attached to this land as to destroy its subjectibility to the right of indemnity selection by the railroad grantee.

The entire claim of Starkey was a mere possession of public land from and after October 20, 1866, unaccompanied by any offer to make his alleged claim of record in any form, either then or at any subsequent time. When he settled he could have asserted a claim of right either under the general pre-emption or the homestead law. The land having been theretofore offered at public sale and remaining unsold, the pre-emption law required him to file his declaratory statement within thirty days after settlement, and to make proof and payment of the purchase price within one year. Starkey never filed nor offered to

file; he never offered proof or payment; nor in any form sought to bring himself within the provisions of the pre-emption law. On the contrary, he expressly swears that his *intention* at time of settlement was to subsequently proceed under the homestead law only, and that he never changed that purpose. No right, therefore, could have attached in his favor under the pre-emption law; and if it might at any time have been possible, it was forfeited years before the railroad selection by Starkey's voluntary failure to comply with the provisions of the pre-emption statute.

The homsetead law, as it stood in 1866 (12 Stats. 392), made an entry the initiation of a homestead right, and that right attached only from date of entry. This was effected by making a written application at the proper land office, filing the stipulated affidavit, and paying the fees required by the homestead law. It was not until May 14, 1880, that Congress changed the law so as to provide that a homestead claim to land could be initiated by settlement (21 Stats. 140, 141).

According to the full extent of his claim, Starkey settled upon this land five months before withdrawal, but during that period never offered to file a homestead application nor to make an affidavit, nor to pay fees, nor to make *any* character of record claim. The utmost of his alleged intention was to make a homestead entry some time during the next year; and before he even attempted to carry that intention into any semblance of effect the land was withdrawn and thereafter reserved. Upon pages 10 and 11 of the Record, Starkey swears that he settled on the land Saturday, October 20th, and that he went to the Land Office on October 22, 1866, for himself and for his son-in-law, Maddox, and says:

"Q. What did you go there for?

"A. To see if we could have the permission to put our "cabins on the claims and live in them until the next "spring before we made our homestead.

"Q. When did you first go there? When did you next "go there?

"A. I don't think we went there any more from that time until the following March. As soon as we heard "that a change was made in the Land Office we went to "see about our homesteads.

"Q. The first time that you went there you did not "offer to file your homestead, but simply to inquire about "it?

"A. Yes."

Starkey further says that in March, 1867, he and his said son-in-law both went to the Land Office and—

"Q. Do you remember what took place then?

"A. We stated our business to him and he stated that "they was not homestead lands, and that there was no "Government lands in Allen County then; that since we "had been there first the land had been drawn out of "market for the benefit of the railroad company."

It is clear from this testimony of Starkey that prior to withdrawal he only claims to have had the *intention* of homesteading at some future time; and even this indefinite purpose is somewhat contradicted by the testimony of his son-in-law, Maddox (Record, pp. 12, 13), viz:

"Q. Why did you not make the homestead entry when "you first went there in the fall?

"A. Well, sir, the reason is this: We did not have "money enough to do it, and we were in a new country "and a strange country and we did not know whether we "would get anything to do."

This testimony points straight to the conclusion that

both men were simply "floaters" in the fall of 1866, and only intended to remain upon the land provided that after a sufficient trial the country and neighbors suited them, and at some future time other conditions proved to be satisfactory. It was not a concluded and definite purpose to make subsequent homestead entry; it was merely a contingency.

And so, also, as to their purpose in remaining upon the land after their second visit to the Land Office. The testimony of Maddox (Record, page 13) clearly shows that they both thoroughly understood and acquiesced in the reservation of the land; but that they stayed on in the hope and upon the chance that it would ultimately prove to fall outside the indemnity limits of the railroad grant.

The case then comes down to one of naked occupancy of the public lands, unaccompanied by any record claim, nor by the doing of any other acts required by the express conditions of the settlement laws. Does any inference run by virtue of such mere occupancy against the legal title under the railroad patent, to say nothing of the equity of the *bona fide* purchaser for value of that legal title?

It has been repeatedly held by this Court that no presumptions run in favor of any claim of right arising out of mere *occupancy* of public lands. It was so said in *Simmons* v. *Ogle* (105 U. S. 273), as follows:

"For so common is it for squatters and trespassers to "settle on the lands of the United States, and so indul- "gent are the laws in encouraging such settlements, and "so numerous are these settlements without claim of "right, and such is the impossibility of resisting or eject- "ing the settlers, or of efficiently asserting the right of "possession by the Government, that the weight of the "inference in favor of any claim of right, whether legal

" or equitable against the United States, growing out of " mere possession, is very slight indeed."

A complete test lies in the indisputable fact that at any time prior to the withdrawal of March 19, 1867 (or for that matter at any subsequent date), Starkey could have abandoned this land without forfeiture of any legal right. True, he could have abandoned the land even after homestead entry, but in such case he would have exhausted forever his right of homestead; but upon the facts of this case he could have left the land forever without in the slightest degree impairing his right of homestead elsewhere and subsequently. Having initiated no homestead right, he had nothing to forfeit. Having nothing to forfeit when the withdrawal became operative, the land was vacant public land subject to the subsequent selection of the railroad company for indemnity purposes. There is no evidence to show that at any subsequent date Starkey tendered a homestead application, affidavit, and fees; but if he did he was too late. If, furthermore, he could possibly have acquired such a right by a tender made at that time, the refusal of the Land Officers to accept it could not have prejudiced his right to prosecute his remedy by appeal. His failure to so prosecute was an abandonment of further claim of right, and is conclusive against him.

To hold the railroad patent invalid upon the facts of this case would be a direct holding that the naked possession of public lands, unaccompanied by any record claim, and continued in direct violation of the specific requirements of the settlement laws, is sufficient to suspend and defeat the operation of the public land laws in favor of other grantees of the United States. A patent would be worthless under such conditions. No subsequent pur-

chaser could rely upon its integrity. The public records would cease to be safe notice, and he would be driven to inquire into the fact of possible occupation at remote days by naked trespassers as destructive of the authority of the Land Department to issue a valid patent.

We submit the judgment below should be affirmed.

A. T. BRITTON,
A. B. BROWNE,
SIMON STERNE,
Att'ys for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

MARY E. WOOD,
PLAINTIFF IN ERROR,
vs.
J. M. BEACH.

No. 143.

In Error to the Supreme Court of the State of Kansas.

BRIEF FOR DEFENDANT IN ERROR.

A. T. BRITTON,
A. B. BROWNE,
G. R. PECK,
Attorneys for Defendant in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1894.

IN THE

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MARY E. WOOD,
PLAINTIFF IN ERROR,
v.
J. M. BEACH.

No. 143.

In Error to the Supreme Court of the State of Kansas.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This was an action brought in the District Court of Allen county, Kansas, by Beach, defendant in error here, to recover possession of the N.E. $\frac{1}{4}$, Sec. 1, Tp. 26, R. 20. The land is within the common indemnity belt of the Missouri, Kansas & Texas Railway (act July 26, 1866, 14 Stats. 289) and of the Leavenworth, Lawrence & Galveston Railroad (act March 3, 1863, 12 Stats. 772). It was withdrawn March 19, 1867, upon the definite location of

the M. K. & T. road, and again April 30, 1867, upon the definite location of the L. L. & G. road. By the order of March 19, 1867, there was reserved "from sale, location "or entry of any kind, except in case of *bona fide* pre- "emptions initiated prior to withdrawal * * * and *all* "the vacant lands between the ten and twenty mile lim- "its." The order of April 30, 1867, further withheld "from sale or location, *pre-emption or homestead entries*, "*all the odd* sections within the limits of twenty miles." * * *

The land was selected August 10, 1872, to indemnify losses in place limits of the M. K. & T. grant, and it was patented to the railroad May 19, 1873. Whatever title passed by that patent is held by Beach, who purchased same in good faith and for a valuable consideration upon faith of the U. S. patent.

The validity of this patent is assailed by Wood upon the following allegations of fact, viz:

That on June 8, 1870, her husband, now deceased, settled upon and occupied this tract with the *bona fide* intention of homesteading it. That he and his family have ever since resided upon and improved the same; that at some time during the year 1870 Wood offered his homestead application to the proper U. S. land office, but without apparent tender of fees, and that his application was rejected because of the prior withdrawal of the land; that he subsequently made renewed applications, which were rejected for the same reason; and that he never appealed from any of the adverse decisions of the District Land Officers.

Judgment was rendered by the trial court in favor of Beach, and that judgment was affirmed by the Supreme Court of Kansas. Hence it was brought, by writ of error, to this Court.

ARGUMENT.

The case of the plaintiff in error is obviously a case of unlawful trespass upon the public domain. For more than three years prior to his alleged settlement, this odd numbered section had been absolutely reserved "from "pre-emption or homestead entries" and withheld to indemnify losses in the M. K. & T. grant. There was never an instant of time at or subsequent to such settlement when Wood could have acquired even a color of right to it under the public land laws. If the order of withdrawal had been made purely as an exercise of administrative authority for the protection of the Congressional grant, it would have been wise and lawful.

Northern Pacific R.R. Co. v. *Buttz*, 119 *U. S.* 55.
Grisar v. *McDowell*, 6 *Wall.* 381.

And, as has been uniformly held by this Court, it would have operated effectually to withhold the land from any form of lawful appropriation.

Wolsey v. *Chapman*, 101 U. S. 755.

But in fact the land was withdrawn by express direction of Section 4 of the grant of July 26, 1866 (14 Stats. 289), which provided—

"That as soon as said Company shall file with the Sec-
"retary of the Interior maps of its line, designating the
"route thereof, it shall be the duty of the said Secretary
"to withdraw from the market the lands granted by this
"act, in such manner as may best be calculated to effect
"the purposes of this act, and subserve the public in-
"terest."

This law would clearly have effected a withdrawal, if

the Secretary of the Interior had failed in the performance of his duty.

The case necessarily stands upon a single proposition, viz., that this Court shall declare the patent to be invalid, because of an alleged homestead settlement, made not only without color of right, but against the express prohibition of law. The homestead law only authorizes entry upon "unappropriated public land" which "*may*, "*at the time the application is made*, be subject to pre-"emption," * * * and the pre-emption act of September 4, 1841, expressly provided that—

"The following classes of lands, unless otherwise spe-"cially provided for by law, shall not be subject to the "rights of pre-emption, viz: First. Lands included in "any reservation by any treaty, law, or proclamation of "the President for any purpose." * * *

Counsel for plaintiff in error insists that the M. K. & T. Company could take indemnity lands only under the grant of July 26, 1866, and that the odd sections within the indemnity belt of the L. L. & G. grant made by the act of March 3, 1863, were not in any view subject to selection by the M. K. & T. Company under its assumed later grant. In this he ignores the plain holding of this Court in the suit brought by the United States to test the validity of the M. K. & T. Company's titles to odd-numbered sections within the common indemnity limits of the L. L. & G. and M. K. & T. grants, as made by the act of March 3, 1863 (118 U. S., 682), wherein, after elaborate argument at the bar, this Court held without dissent—

1st. That the M. K. & T. Company lawfully took under *both* the grants of March 3, 1863, and July 26, 1866, because it had become, by assignment, entitled to the grant of 1863 for the construction of the road down the Neosho

Valley to the intersection of that line with the L. L. & G. road.

2d. That the later grant of July 26, 1866, to the M. K. & T. Company, over the same line, being made after it had succeeded to the rights of the former company under the grant of 1863, it must be assumed that Congress well understood the situation, and intended that the benefits of the 1863 grant and of the enlarged and extended grant of 1866 should both inure to the M. K. & T. Company. And the contention of counsel that the railroad title must fail because the lands were never selected by it under the grant of 1866, and could not be so taken by it under the grant of 1863, is fully answered by the plain, express reasoning of the Court in the case cited.

And in the later case of the United States against the M. K. & T. Company (141 U. S. 358) brought to vacate the M. K. & T. Company's patents for *even*-numbered sections within the indemnity limits of the grant of 1866, this Court recites at length (pages 382 *et seq.*) the decision rendered in the former case (118 U. S., *supra*), and expressly reaffirms therein the right of the M. K. & T. Company as the successor in interest under the grant of March 3, 1863, to thus receive odd-numbered sections within the indemnity limits of *that* grant. The questions so elaborately argued by counsel are not now, therefore, open to discussion, and we decline to follow him further therein. We submit that the judgment below should be affirmed.

A. T. BRITTON,
A. B. BROWNE,
GEO. R. PECK,
Attorneys for Defendant in Error.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 143.

MARY E. WOOD, PLAINTIFF IN ERROR,

vs.

J. M. BEACH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED APRIL 27, 1891.

(14,601.)

(14,601.)

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 2, 1894.

1 In the Supreme Court of the State of Kansas.

MARY E. WOOD, Plaintiff in Error,
vs.
J. M. BEACH, Defendant in Error.

Be it remembered that on the 20th day of August, 1889, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition in error, with case made attached thereto as a part thereof, from the district court of Allen county, which is in words and figures as follows, to wit:

2 No. 6130.

In the Supreme Court of the State of Kansas.

MARY E. WOOD, Plaintiff in Error,
vs.
J. M. BEACH, Defendant in Error. } 6130.

Petition in Error.

The said Mary E. Wood, plaintiff in error, complains of said defendant in error, for that the said J. M. Beach, at the June, 1889, term of the district court of Allen county, State of Kansas, recovered a judgment by the consideration of said court against the said Mary E. Wood in a certain action then pending in the said court, wherein the said J. M. Beach was plaintiff and the said Mary E. Wood *et al.* were defendants.

The original case made, duly certified and attested, is hereunto attached, marked "Exhibit A," and made a part of this petition in error.

And the said Mary E. Wood avers that there is error in said record and proceedings, in this, to wit:

1. Said court erred in overruling motion of plaintiff in error for a new trial.

2. Said court erred in admitting evidence on the part of defendant in error.

3. Said court erred in refusing and ruling out competent and legal evidence on the part of the plaintiff in error.

4. That said judgment was rendered by said district court in favor of the defendant in error when, according to law and evidence, it ought to have been rendered in favor of this plaintiff in error.

5. Said court erred in admitting as evidence in favor of the defendant in error the pretended patent from the State of Kansas to the Missouri, Kansas and Texas Railway Company.

6. There are other errors prejudicial to the plaintiff in error manifest upon the face of the record.

Wherefore the plaintiff in error prays that said judgment so rendered may be reversed, set aside, and held for naught, and that a judgment may be ordered to be rendered in favor of the plaintiff

in error and against the defendant in error, and that the plaintiff in error be restored to all rights she has lost by the rendition of such judgment, and for such further relief as to the court may seem just.

MARY E. WOOD, *Plaintiff in Error,*
By BENTON, SCOTT & CAMPBELL,
Her Attorneys.

Filed Aug. 20, 1889.

C. J. BROWN,
Clerk Sup. Court.

3 In the District Court of Allen County, Kansas.

J. M. BEACH, Plaintiff,
vs.
MARY E. WOOD, FRANK KIRBY, PIERCE KIRBY, CLARK WOOD, and A. S. ROGERS, Defendants.

Be it remembered that heretofore, to wit, on the 7th day of February, 1887, said plaintiff, J. M. Beach, commenced his action against said defendants by filing in the district court of Allen county, of that date, his petition, which is in words and figures following, to wit:

In the District Court of Allen County, Kansas.

J. M. BEACH, Plaintiff,
vs.
MARY E. WOOD, FRANK KIRBY, CLARK WOOD, PIERCE KIRBY, and A. S. ROGERS, Def'ts.

Petition.

Plaintiff says that he owns and is entitled to the immediate possession of the following-described real estate, situated in Allen county, Kansas, viz: The west half of sec. 23, township 25, range 20, and the east half of sec. 1, town. 26, range 20. The defendants wrongfully and unlawfully withhold possession of said premises.

And for second and further cause of action plaintiff says that for three years past defendants have wrongfully detained possession of the premises mentioned in the last preceding cause of action, to pl'ff's damage in the sum of one thousand dollars.

Wherefore plaintiff prays judgment for the recovery of said premises and for his damages so as aforesaid sustained.

L. W. KEPLINGER,
Att'y for Plaintiff.

Said petition is endorsed as follows, to wit:

"J. N. Beach *vs.* Kirby. Petition. Filed February, 1887. M. P. Jacoby, dist. clerk."

And afterwards, to wit, on the 29th day of November, 1887, the defendant Mary E. Wood filed her answer to said petition, which is in words and figures following, to wit:

"STATE OF KANSAS, } ss:
Allen County, }

District Court in and for said County and State.

J. M. BEACH, Plaintiff, }
vs.
MARY E. WOOD, Defendant. }

Answer.

1st. The defendant, for answer to the petition filed by the plaintiff herein and to each cause of action therein stated, denies each and every allegation in the said several causes of actions therein contained.

4 2nd. And, further answering, the defendant says that he is the owner and in the actual possession of the northeast quarter of section 1 (one), town. 26, range 20 E., in Allen county, Kansas, and is entitled to the possession of said land.

Wherefore the defendant prays judgment against the plaintiff, declaring defendant to be owner of said land and to be entitled to hold the possession thereof, and for his costs herein expended.

MARY E. WOOD, *Defendant.*"

On the back of said answer appears the following endorsement, to wit: "J. M. Beach *vs.* Mary E. Wood. Answer. Filed November 29, 1887. M. P. Jacoby, dist. clerk."

The issues having been fully joined, this cause came on for trial on the 17th day of January, 1889, it being an adjourned term of the November, 1888, term of said court: whereupon said cause was submitted to the court for trial without a jury, a jury being waived, upon the following agreed statement of facts, to wit:

J. M. BEACH, Plaintiff, }
vs.
MARY E. WOOD, Defendant. }

Agreed Statement of Facts.

May 19, 1873, a patent was issued covering the land in controversy, said patent being the one recorded in Book "K," p. 392. A copy of said patent is as follows, to wit:

5 6128–6. 6130–6.

"The State of Kansas to all to whom these presents shall come Greeting:

Whereas the Missouri, Kansas and Texas Railway Company, having constructed a railroad and telegraph line from Junction City to the southern boundaries of the State of Kansas, is entitled under the provisions of the act of Congress approved March 3, one thousand eight hundred and sixty-three (1863), entitled "An act for

a grant of lands to the State of Kansas in alternate sections to aid in the construction of certain railroads and telegraphs in said State,' and of the act of the legislature of the State of Kansas approved February 9, one thousand eight hundred and sixty-four (1864), entitled 'An act to accept a grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of certain railroads and telegraphs,' to the following-described tracts of land, as certified by the Commissioner of the General Land Office and approved by the Secretary of the Interior April 10th, one thousand eight hundred and seventy-three (1873), namely (among other tracts), the northeast quarter (¼) of section one (1), township twenty-six (26), range twenty (20), in Allen county, Kansas:

Now know ye that the State of Kansas, in consideration of the premises and in conformity with the said law, has given and granted, and by these presents does give and grant, unto the Missouri, Kansas and Texas Railway Company and assigns the said tracts above described; to have and to hold the same, together with all rights, privileges, immunities, appurtenances of whatsoever nature accruing, under the provisions of the laws relating thereto and in accordance with the act of Congress of March 3, 1863, set forth in the foregoing, subject to all its conditions and to any valid interfering rights which may exist to any of the tracts embodied in the foregoing.

In testimony whereof I, Thomas A. Osborn, governor of the State of Kansas, have caused these letters to be made patent and the seal of the State of Kansas to be hereunto affixed.

Given under my hand, at the city of Topeka, this nineteenth day of May, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh, and of the thirteenth year of the State.

By the governor:

THOMAS A. OSBORN.

W. H. SMALLWOOD,
Secretary of State."

Filed June 13, 1873.

J. S. FAST.

6 Also the instruments were executed which are recorded in Book "K," p. 320, and "H," 593, each of which instruments cover the land in controversy. (A copy of said record is as follows, to wit:)

"This indenture made this 28th day of February one thousand eight hundred and seventy-two, between the Missouri, Kansas and Texas Railway Company, and Russell Sage and N. A. Cowdry, trustees of the Missouri, Kansas and Texas Railway Company (late Union Pacific Railway Company Southern branch) under and by virtue of a mortgage or deed of trust dated November 14th 1868 and the Union Trust Company of New York, trustess under a mortgage or deed of trust executed by said railroad company, dated

February 1, 1871, of the first part, and the Leavenworth Lawrence and Galveston Railroad Company of the second part witnesseth:

That, whereas, the said Missouri, Kansas and Texas Railway Company *Company* did on the 9th day of October one thousand eight hundred and seventy-one in pursuance of an agreement made anentered onto by and between said last-named company and said party of the second part and in consideration of one dollar in hand paid, grant, bargain, sell, release and quitclaim unto the said Leavenworth, Lawrence and Galveston Railroad Company, the tracts of land hereinafter described and lying and being in the State of Kansas, and

Whereas, said deed was executed for the *pur*pose of par-tioning said tracts of land according to the stipulation of said agreement of February twentieth A. D. one thousand eight hundred and seventy-one, and upon the understanding and according to the recital therein that the State of Kansas had received title to the said lands from the United States: and,

Whereas, it appears that the United States did not list or convey said tracts of lands to the State of Kansas until subsequent to the execution of said deed of October 9, 1871, and then listed or conveyed said tracts by proportions and descriptions differing from those recited in the aforesaid agreement of February 20, 1871 and the deed of October 9th A. D. one thousand eight hundred and seventy-one, in pursuance thereof, and

Whereas, a doubt has arisen as to the sufficiency of said deed and the said Leavenworth, Lawrence and Galveston Rai-road Company requiring a further assurance of said land.

Now, therefore, this indenture witnesseth:

That in consideration of the premises aforesaid and for the confirmation of said deed of October ninth A. D. one thousand eight hundred and seventy-one, as also for and in consideration of the sum of one dollar in hand paid the said Missouri, Kansas and Texas Railway Company hath granted, bargained, sold, al*l*ened, enfeoffed, released and conveyed, and does by these presents grant, bargain, sell, alien, enfeoff, release and convey unto the said Leavenworth, Lawrence and Galveston Railroad Company its successors and assigns the following tracts of land lying and being in the State of Kansas, viz: (among other tracts) all of section one (1) township twenty-six (26) range twenty (20) in Allen county, Kansas.

In case any tract or tracts of land above recited shall not prove to be in the county or counties, in which it is or they are mentioned to be, such misrecital shall not affect this conveyance but the descriptions by sections, townships and range shall govern, and lest there should be doubt because the counties in which *are* certain sections are mentioned in some cases before the township and range, it is hereby declared that the sections lie in the township and range first recited after the mention of the sections. And the said party
7 of the first part doth hereby covenant and agree to and with the party of the second part, that it has not made, suffered or caused to be made any conveyance, lien or any incumbrance of any nature whatsoever, excepting the mortgages or trust

deeds hereinbefore mentioned on the above-described lands or any part thereof, and that it will forever warrant and defend the title to said lands, and every part thereof, against all persons whomsoever claiming by, through or under the party of the first part, but against none other, and the party of the first part further covenants and agrees to and with the party of the second part that this instrument shall operate to convey to the party of the second part any other or further title that the party of the first part may hereafter acquire or receive through or by or in virtue of any law of the United States, or of the State of Kansas or treaty of the United States with any Indian tribe, to said above described lands or any parcel thereof, and hereby further covenants and agrees to execute and deliver to said party of the second part its successors and assigns any further assurance or conveyance which may be necessary to carry out and effectuate the object and purposes of this instrument, and the said Russell Sage and N. A. Cowdry trustees as aforesaid, and the Union Trust Company of New York also trustees as aforesaid, do by these presents under and by virtue of the mortgages or trust deeds hereinbefore referred to, and in consideration of the premises aforesaid release and convey to the said party of the second part all their right, title, interest, property, possession, claim demand and estate of the said trustees in and to the above-granted premises in accordance with the terms and conditions of said mortgages or trust deeds. This release on the part of the aforesaid trustees is made for the purpose of carrying into effect a compromise or settlement of conflicting claims to portions of the mortgaged premises by said railroad companies.

In witness whereof the said Missouri, Kansas & Texas Railway Company and the Union Trust Company of New York have caused these presents to be signed by their respective presidents and secretaries, with the seals of the respective corporations attached, and the said Russell Sage and N. A. Cowdry, trustees, have hereunto set their hands and seals the day and year first above written.

LEVI PARSONS,
[SEAL.] *President Missouri, Kansas and Texas Railway Company.*

Attest: H. B. HANSON,
Secretary of the Missouri, Kansas and Texas Railway Company.

UNION TRUST COMPANY OF NEW YORK.
[SEAL.] By J. H. FROTHINGHAM, *President.* [SEAL.]
C. T. CARLTON, *Secretary.* [SEAL.]
RUSSELL SAGE, [SEAL.]
N. A. COWDRY, *Trustees.* [SEAL.]

STATE OF NEW YORK, } ss:
City and County of New York, }

Be it remembered that on this twenty-eighth day of February, A. D. one thousand eight hundred and seventy-three (1873), before the subscriber, a commissioner in and for the State of New York, appointed by the governor of the State of Kansas to take proofs,

acknowledgements of deeds, mortgages, or any other instrument to be used or recorded in the State of Kansas, personally appeared

8 Levi Parsons, president of the Missouri, Kansas & Texas Railway Company, and Isaac H. Frothingham, president of the Union Trust Company of New York, trustees, and Russell Sage and N. A. Cowdry, trustees, who are personally known to me to be the identical persons whose names are affixed to the foregoing indenture as respectively presidents, and duly acknowledged the execution of the same as the voluntary act and deed of said Missouri, Kansas and Texas Railway Company and said Union Trust Company of New York and of said trustees; and said Levi Parsons and Isaac H. Frothingham, being by me severally duly sworn, each for himself deposes and says that he is president as aforesaid, that they signed the foregoing instrument as such president, and that the respective corporate seals of said companies were caused to be affixed thereto as the act and deed of said companies respectively by order and authority of said companies for the uses and purposes therein mentioned.

In testimony whereof I have hereunto set my hand and affixed my official seal in the city of New York on the day and year above written.

J. H. FAIRBANKS,

[SEAL.] *Commissioner for the State of Kansas.*"

"Know all men by these presents that the Leavenworth, Lawrence and Galveston Railroad Company and the Missouri, Kansas and Texas Railroad Company, by their agreement made and entered into February 20th, A. D. 1871, and said agreement having been duly and subsequently ratified by the boards of directors of said companies, did determine upon the basis of a partition of certain lands situated in the State of Kansas and granted to said companies by the United States and by the State of Kansas, the said State having received the same from the United States, and lying within the conflicting land-grant limits of the roads of said companies in said State of Kansas, and inasmuch as the partitions and divisions of said lands contemplated in said agreement *has* been made, so far as the lands hereinafter mentioned are concerned, to the mutual satisfaction of said companies:

Now, therefore, in pursuance of said agreement and in consideration of one dollar to it in hand paid, the said Missouri, Kansas & Texas Railroad Company, party of the first part, doth grant, bargain, sell, release, and quitclaim unto the said Leavenworth, Lawrence and Galveston Railroad Company, party of the second part, the following tracts of land, lying and being situate in the State of Kansas, to wit (among other tracts): All of section one (1), township twenty-six (26), range twenty (20), in Allen county, Kansas.

In case any tract or tracts of land above recited shall not prove to be in the county or counties in which it is or they are mentioned to be such misrecital shall not effect this conveyance, but the descriptions by sections, township, and range shall govern, and lest there should be doubt because the counties in which *are* certain sections

are mentioned in some cases before the township and range it is hereby declared that the sections lie in the township and range first recited after the mention of the sections; and the said party of the first part doth hereby covenant and agree to and with the party of the second part that it has not made, suffered, or caused to be made any conveyance, lien, or incumbrance of any nature whatsoever on the above-described lands or any part thereof, and that it will forever warrant and defend the title to said lands and every part thereof against all persons whomsoever claiming by, through, or under the party of the first part, but against none other; and the party of the first part further covenants and agrees to and with the party of the second part that this instrument shall operate to convey to the party of the second part any other or further title that the party of the first part may hereafter acquire or receive through or by or in virtue of any law of the United States with any Indian tribe to said above-described lands or any parcel thereof, and hereby further covenants and agrees to execute and deliver to said party of the second part, its successors and assigns, any further assurance or conveyance which may be necessary to carry out and effectuate the object and purpose of this instrument.

In witness whereof the party of the first part has affixed its corporate seal unto this instrument and caused the same to be signed by its president this ninth day of October, A. D. 1871.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

[SEAL.] By LEVI PARSONS, *President.*

Attest: H. B. LANSON, *Secretary.*

STATE OF NEW YORK, } ss:
County of New York, }

Be it remembered that on this ninth day of October, A. D. 1871 before me, J. H. Fairbanks, a notary public in and for said county and State, personally appeared Levi Parsons, president, to me personally known to be the identical person who signed the foregoing instrument as the president of the Missouri, Kansas and Texas Railroad Company, and for himself as such president and for and in behalf of said Missouri, Kansas and Texas Railroad Company duly acknowledged the execution of the same.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year last above written.

[SEAL.] J. H. FAIRBANKS,
Notary Public, New York.

Filed for record Jan. 20, 3 p. m., 1872.

R. B. STEVENSON, *Rd.*

May 10th, 1867, and April 3rd & 30th, 1867, orders were received at the Humboldt, Kansas, land office, the same being the district in which said lands are situated, from the General Land Office, copies of which orders appear on pages 58, 59, and 60 of the 27th Kansas

Reports; which orders covered the lands in controversy. The L., L. & G. R'y Co. by its deed, which is recorded — Book "M," p. 412, conveyed the premises in controversy to plaintiff July 26, 1881. The Kansas City, Lawrence and Southern Kansas Railway Company, which is the legal successor of the patentee in the above-mentioned patent, executed to plaintiff the deed which is recorded in Book "W," p. 46. (A copy of said deed is as follows, to wit:)

"No. 375.

Know all men by these presents that the Kansas City, Lawrence and Southern Kansas Railroad Company, for the consideration of ten hundred and twenty-four dollars to it paid by Joel M. Beach, of Bureau county, State of Illinois (the receipt of which is hereby acknowledged), doth hereby grant, bargain, and sell unto the said Joel M. Beach the following-described real estate lying and being in the county of Allen and State of Kansas, viz: The east half of section one (1), township twenty-six south, range twenty (20) east, of 6th principal meridian, containing, according to the United States survey, three hundred and twenty (320) acres, be the same more or less; to have and to hold to the said grantee, his heirs and assigns forever, to their own use and behoof; and the said grantor doth hereby covenant with the said grantee that at the ensealing of these presents the premises above described are free from all incumbrances, and that it will warrant and defend the title thereto to the said grantee, his heirs and assigns, against the lawful claims of all persons whomsoever.

In witness whereof the said grantor hath set its seal and caused these presents to be signed by its president and countersigned by its land commissioner this 26th day of July, A. D. 1881.

T. JEFFERSON COOLIDGE, *President.*
GEO. H. NETTLETON,
Land Commissioner.

STATE OF MASSACHUSETTS, }
County of Suffolk, } ss:

Before me, Geo. L. Goodwin, a notary public, this day came the Kansas City, Lawrence and Southern Kansas Railroad Company, by T. Jefferson Coolidge, its president, who is personally known to me to be the same person whose name is subscribed to the within deed as having executed the same, and who then and there acknowledged the within to be the act and deed of said company.

In witness whereof I have set my hand and notarial seal this 8th day of August, A. D. 1881.

GEO. L. GOODWIN, [SEAL.]
Notary Public.

Filed September 3rd, 1881."

The defendant makes no objection on account of the use of said records or copies in lieu of the originals, but objects to each and every one of said deeds, patent, conveyances, and letters as being in-

competent, irrelevant, and immaterial, void, and convey no title, being in derogation of the act of Congress of the United States of America; each of which objections were overruled by the court, and the defendant duly excepted to each and — of said rulings and still except- (and the same objections made to each of said offers as made and same ruling by the court and exceptions by defendant, and it is understood that they shall be treated as following each offer).

In the District Court of Allen County.

J. M. BEACH, Plaintiff,
vs. } No. 2609.
MARY E. WOOD, Def't.

For the purposes of this case it is agreed that the evidence on the part of the defendant is as follows:

That Mary E. Wood, the defendant, is the widow of C. B. Wood, late of Allen county, Kansas, deceased.

That said C. B. Wood did, on the 8th day of June, 1870, settle on and occupy the land in controversy in this action with *bona fide* intention of homesteading the same under the homestead laws of the United States; that he immediately thereafter erected lasting and valuable improvements on said lands, consisting of frame house, 12 x 24 feet in size and 10 feet high, and hay stable; planted orchard of 50 apple trees and other peach & 40 to 50 cherry trees, and broke during the year 1876 6 or 8 acres, and during 1871 about 12 acres, said improvements being of the value of $600.00; and that from that time, June 8th, 1870, the said C. B. Wood, with his wife (defendant) and family, did continuously reside on and occupy said premises up to the time of his death—up to Decem. 24, 1886—and his widow, the defendant in this case, with her family, has ever since resided on and occupied the same as their homestead; that the said C. B. Wood, deceased, and his widow (def't herein) and family have ever since June 8, 1870, been in visible, open, notorious, and exclusive possession of said premises; that since the time of settlement, June 8, 1870, to the time of commencement of this action defendant and her deceased husband have continued to improve said farm until at the time of commencement of this action they had almost 80 acres broken
11 and in cultivation, and about 45 apple trees in bearing, about 20 peach trees in bearing, built and addition to house 10 x 20 ft. in size; so that the aggregate value of the improvements made thereon at the time of the commencement of this action was not less than $1,000.00; that during the year 1870 C. B. Wood, deceased, made application to the U. S. land office at Humboldt, Kansas, to file on said land, but was rejected because it was claimed the lands had been withdrawn, and that several times after, during the life-time of said C. B. Wood, he made similar applications, and they were likewise rejected by the U. S. land officers at Humboldt, Kansas. The said lands are in the indemnity strip of the M., K. & T. and L., L. & G. R. R's; that the said lands were selected by R. R. Co's August 8th, 1872, and approved by the proper U. S. officer April

10th, 1873; that at the time of the selection of said lands the said C. B. Wood, deceased, and his family, among whom were this defendant, wife of said C. B. Wood, were living upon said land and had the same improved as hereinbefore set forth, and the R. R. officers knew these facts, and that said C. B. Wood was claiming same as a homestead; that the said C. B. Wood, deceased, was at the time he settled on said land a citizen of the United States, past 21 years of age, and the head of a family, and had not prior to that time exercised or attempted to exercise his right of homesteading or pre-empting any land under the laws of the U. S., and possessed all the requisities and necessary qualifications to entitle him to homestead or pre-empt Government lands at that time, and since then to the time of his death. It is further agreed that in case the plaintiff is entitled to recover in this action he will be entitled to judgment for the sum of $75.00 per annum for use and occupation from whatever date is 3 years prior to the commencement of this action, to wit, Feb'y 7th, 1884.

The plaintiff objects to each and every part of the foregoing as incompetent, irrelevant, and immaterial, and said evidence is admitted, subject to such exceptions.

The above and foregoing is a true and correct copy of the agreed statement of facts between the parties to this action and is all the evidence introduced in the case.

There being no further evidence, the court took the case under advisement; and afterwards, to wit, on the 17th day of June, 1889, it being the June, 1889, term of said court, the court rendered judgment in said action against said defendant and in favor of said plaintiff; to which order and judgment the defendant then and there duly excepted and still excepts. A copy of the journal entry of said judgment is in words and figures as follows, to wit:

"JUNE 17, 1889.

J. M. BEACH
vs. } No. 2609.
MARY E. WOOD.

This cause having been under advisement, the court proceeds to render judgment; whereupon the court finds in favor of the plaintiff, that he is entitled to recover the possession of the land mentioned in defendant's answer and for $375.00, damages, and for costs of suit. It is therefore considered, ordered, adjudged, and decreed that plaintiff have and recover of defendant, Mary E. Wood, judgment for the recovery of the possession of the land in controversy, to wit, the northeast quarter of section one (1), township twenty-six, range twenty, in Allen county, Kansas; and it is further ordered and adjudged that plaintiff recover the sum of $375.00 *dollars*, as damages sustained for the wrongful detention of said lands, and for costs of suit, taxed at $—."

12 This cause comes on further to be heard upon the motion by the defendant for a new trial; which motion is by the court overruled; to which defendant then and there duly excepted;

and for good cause shown defendant is given 40 days to make a case for the Supreme Court, and plaintiff is given 5 days to suggest amendments, and the case to be settled in 10 days thereafter on 5 days' notice; and supercedeas bond fixed at $400.00, and stay of execution granted for 60 days.

To each and all of said orders, judgments, and decrees the defendant then and there duly excepted and still excepts.

On the 17th day of June, 1889, said defendant, Mary E. Wood, filed in said court her motion for new trial; which motion was in words and figures following, to wit:

In the District Court of Allen County, Kansas.

J. M. BEACH)
vs.
MARY E. WOOD, Defendant.)

Motion for New Trial.

Now comes said defendant, Mary E. Wood, and moves the court to vacate and set aside the decision and judgment of the court heretofore rendered in this action and grant a new trial for causes affecting materially the substantial rights of said defendant in this action; which causes are as follows, to wit:

1. Irregularity in the proceedings of the court, by which the defendant was prevented from having a fair trial.

2. Abuse of discretion by the court, by which defendant was prevented from having a fair trial.

3. Irregularity of the prevailing party, by which the defendant was prevented from having a fair trial.

4. Misconduct of the prevailing party.

5. Error in the assessment of the amount of recovery, the amount thereof being too large.

6. That the decision is not sustained by sufficient evidence.

7. That the decision is contrary to law.

8. Errors of law occurring at the trial and excepted to by the defendant at the time.

BENTON & SCOTT AND A. H. CAMPBELL,
Att'ys for Def't, Mary E. Wood.

And on said 17th day of June, 1889, this cause came on further to be heard upon the motion of defendant, Mary E. Wood, for a new trial; which motion was by the court overruled; to which ruling of the court the defendant then and there duly excepted and still excepts; and thereupon, for good cause shown, the defendant is given forty days to make a case for the Supreme Court, and plaintiff given five days to suggest amendments thereto, and the case to be settled in ten days thereafter, on five days' notice.

And afterwards, to wit, on the 19th day of July, 1889, the court made an order in said action; which order is in words and figures following:

In the District Court of Allen County, Kansas.

J. M. BEACH, Plaintiff.
vs.
MARY E. WOOD, Defendant.

13 Upon application, and for good cause shown, the time for making a case in this action for the Supreme Court is hereby extended ten days, upon the same terms with regard to suggesting amendments, settling, and notice as provided for in the original order.

Done at Erie, Kansas, this 19th day of July, 1889.

L. STILLWELL,
Judge District Court.

On the back of said order appears the following endorsement, to wit: "Filed Jul- 24, 1889. M. P. Jacoby, dist. clerk."

The foregoing contains a true and correct statement of all pleadings, motions, orders, evidence, findings, and proceedings upon which judgment was rendered.

I, the undersigned attorney for the plaintiff in the foregoing suit, certify that the foregoing case was duly served on me this 29th day of July, 1889.

L. W. KEPLINGER,
Att'y for J. M. Beach.

STATE OF KANSAS, } *ss:*
Allen County, }

This is to certify that the foregoing above case made and amendments thereto have been duly served in due time and the amendments thereto duly suggested and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same, as above set forth and as corrected by me, is true and correct and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings, and judgments had in such case, and I hereby settle, allow, certify, and sign the same as true and correct, and hereby order that the clerk of the district court attest the same with the name and seal of said court and file the same of record as provided by law.

Witness my hand, at Iola, Kansas, this 6th day of August, 1889.

L. STILLWELL,
Judge Dist. Court.

Attest:

M. P. JACOBY, *Clerk.* [SEAL.]

August 6, 1889.

I assent to signing of above without notice.

L. W. KEPLINGER.

No. 6130. Mary E. Wood, pl'ff in error, *vs.* J. M. Beach, def't in error. Case made.

Filed August 6th, 1889.

M. P. JACOBY,
Clerk Dist. Court.

Filed August 20, 1889.

C. J. BROWN,
Clerk Supreme Court.

14 And also, on the 25th day of October, 1889, there was filed in the office of the clerk of the supreme court of the State of Kansas a waiver of the issuance and service of a summons in error in this cause, which is in the words and figures as follows, to wit:

15 In the Supreme Court of the State of Kansas.

NEWTON L. ARD, Plaintiff in Error,
vs.
ALEX. BRANDEN, Defendant in Error.

N. L. ARD, Plaintiff in Error,
vs.
C. H. PRATT, Def't in Error.

MARY E. WOOD, Plaintiff in Error,
vs.
J. M. BEACH, Defendant in Error.

Waiver of Issuance and Service of Summons.

I, the undersigned, attorney for all of the above-named defendants in error, hereby waive the issuing and service of a summons in error in each of the above-entitled cases and enter an appearance for each of the above-named defendants in error in each of said cases.

L. W. KEPLINGER,
Attorney for Alex. Branden, Def't in Error; C. H. Pratt, Defendant in Error; J. M. Beach, Defendant in Error.

6128. Newton L. Ard *vs.* Alex. Branden. Waiver.

Filed October 25th, 1889.

C. J. BROWN,
Clerk Supreme Court.

16 And afterwards, on the 6th day of March, 1890, the same being one of the regular judicial days of the January term, 1890, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

MARY E. WOOD, Plaintiff in Error,
vs.
J. M. BEACH, Defendant in Error.

This cause comes on to be heard on the petition in error and the transcript of the record of the district court of Allen county, and also comes on to be heard the motion of the defendant in error to affirm the judgment of the court below for the reasons set out in said written motion on file; and thereupon it is ordered that the said motion to affirm be overruled, and the said cause was submitted on the brief of plaintiff in error and taken under advisement by the court. The plaintiff in error is allowed ten days within which to file additional brief, and defendant in error is allowed 20 days from this date within which to file brief.

17 And afterwards, on the 4th day of April, 1890, the same being one of the regular judicial days of the January term, 1890, of the supreme court of the State of Kansas, before said court, in session at the supreme court room, in the city of Topeka—present, Honorable Albert H. Horton, chief justice; Honorable Daniel M. Valentine and Honorable William A. Johnston, associate justices, and C. J. Brown, clerk of said court—the following proceeding, among others, was had and entered of record as follows, to wit:

MARY E. WOOD, Plaintiff in Error,
vs.
J. M. BEACH, Defendant in Error.

This cause comes on for decision, and thereupon it is ordered and adjudged that the judgment of the court below be affirmed.

It is further ordered that the plaintiff in error pay the costs of this case in this court, taxed at $—, and hereof let execution issue.

18 And also, on the said 4th day of April, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas the syllabus and opinion of the court in said cause, which are in the words and figures as follows, to wit:

19 MARY E. WOOD
vs.
J. M. BEACH. } No. 6130.

Error from Allen county. Affirmed.

Syllabus. By the Court—Horton, C. J.

Purporting to act within the provisions of the acts of Congress of March 3rd, 1863, 12 U. S. Stat., 772; July 1st, 1864, 13 U. S. Stat., 339, and July 26th, 1866, 14 U. S. Stat., 289, granting lands to the State of Kansas for railroad purposes, the Department of the Interior of the United States withdrew in 1867 all the odd sections within the limits of twenty miles of the located route of the railroads.

In 1870 W. settled upon one-quarter of an odd section so withdrawn and made improvements thereon. During that year he made application to the local land office to file on the land, but was informed that the land had been withdrawn and his application was rejected. He continued to reside upon the land and to make improvements thereon and was upon the land when it was selected by the railroad companies on August 8th, 1872, but he took no appeal from any ruling or order of the local land office.

A patent was issued for the land to the Missouri, Kansas and Texas Railroad Company on May 19th, 1873.

Held, that the grantee of the railroad company has the legal title to the land and is entitled to possession thereof as against W.

Held, further, that W. never acquired any legal or equitable title to the land, either as a homestead or pre-emptor, under the acts of Congress relating to public lands.

All the justices concurring.

A true copy.

Attest:

____ ____,
Clerk Supreme Court.

20

MARY E. WOOD)
v.) No. 6130.
J. M. BEACH.)

Error from Allen county. Affirmed.

The opinion of the court was delivered by HORTON, *C. J.*:

This was an action in the court below brought by J. M. Beach against Mary E. Wood to recover the possession of the northeast quarter of section one, township twenty-six, range twenty, in Allen county.

Judgment was rendered for the plaintiff and against the defendant, and Mrs. Wood brings the case here.

The husband of Mrs. Wood, C. B. Wood, deceased, made a settlement upon the land on June 8th, 1870, and made lasting and valuable improvements.

J. M. Beach claims title through conveyances from the Missouri, Kansas & Texas Railroad Company and the Leavenworth, Lawrence and Galveston Railroad Company. The patent for the land was issued May 19th, 1873.

It appears from the record that the land is in the indemnity strip of the Missouri, Kansas and Texas and the Leavenworth, Lawrence and Galveston Railroad Companies.

The land was withdrawn by the Department of the Interior on March 19th, 1867, and April 30th, 1867. The first order of the department was received at Humboldt on April 3rd, 1867, and the second on May 10th, 1867. In the letter of March 19th, 1867, from the Department of the Interior to the register and receiver at Humboldt it was said, among other thing, that "you will, upon its receipt, proceed to mark on your plats the limits thereon designated,

and will reserve from sale, location, or entry of any kind,
21 except in case of *bona fide* pre-emptions initiated prior to withdrawal, all the odd-numbered sections within the ten-mile limits and all the vacant lands between the ten and twenty mile limits.

The even sections within the ten-mile or granted limits you will withdraw from private entry, and the same will only be subject to pre-emption and homestead entry, at the rate of $2.50 per acre, until regularly offered at public sale, except in cases of *bona fide* pre-emptions where settlement was made prior to this withdrawal, wherein the party may make proof and pay for the same at $1.25 per acre."

In the letter of April 30th, 1867, from the Department of the Interior to the register and receiver at Humboldt, it was also said: "Under date of March 19th, 1863, I transmitted to you a diagram showing the designated line of route, with the ten-mile or granted limits of the Leavenworth, Lawrence and Galveston railroad, for which a grant of land is made to Kansas by the act of Congress approved March 3rd, 1863.

By my letter accompanying the diagram I ordered, with the approval of the Secretary, that the odd sections within said limits should be withheld from further sale or location, pre-emption or homestead entries, except where inceptive pre-emption rights had attached prior to withdrawal, and directed that the even sections should be held subject to pre-emption and homestead entry, at $2.50 per acre.

Herewith I enclose a map of the actual location of the route of said road, with that portion of the ten and twenty mile limits designated by sectional lines as falling within your district. You
22 will now withhold from sale or location, pre-emption or homestead entries, all the odd sections within the limits of twenty miles, as laid down in the accompanying diagram, the even sections within the ten-mile limits being held at $2.50, as under the former withdrawal." See Kansas City, Lawrence and South Kansas Railroad Co. *vs.* The Attorney General, 118 U. S., 682.

The land was selected by the railroad companies on August 8th, 1872, and approved April 10th, 1873. At the time of the selection Wood, with his family, was living on the land, but his settlement was not made until after the withdrawals of 1867.

Even if the withdrawals of the land in the indemnity strip by the Department of the Interior in 1867 were not fully authorized by the statute, so long as the order of withdrawal was actually in force it probably was sufficient to defeat any settlement for pre-emption or homestead.

It was said in Wolsley *v.* Chapman, 101 U. S., 755: "It is conceded that the lands in controversy were actually reserved from sale by competent authority when the selection was made under the act of 1841. They were reserved also in consequence of the act of 1846. The proper executive department of the Government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State

above the Raccoon fork until the differences were settled, either by Congress or judicial decision. For that purpose an authori-tive order was issued, directing the local land officers to with-old all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in Riley *vs.* Wells, was sufficient to de-
23 feat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law by reason of which this action was taken did not contemplate such a withdrawal."

When Wood, in 1870, made application to the local land office at Humboldt to file upon the land, he was informed the land had been withdrawn and his application was rejected. Subsequently he renewed his application to the local land officers, but never appealed from any of the rulings or decisions of that office.

It does not appear that he tendered the fees at the time of his applications. He held possession of the land, but otherwise acquiesced in the ruling of the local land officers. He never appealed to the Land Department at Washington. One of the duties of that department, in cases relating to the public lands, is to correct errors of law and of fact committed in the local land offices when properly brought to its attention. Krichbaum *v.* Perry, 5 Land Decisions, 403; Burnham *v.* Starkey, 41 Kas., 604, and of Pratt *v.* Ard, just decided.

The judgment of the district court will be affirmed.

All the justices concurring.

A true copy.

Attest:

____ ____,

Clerk Supreme Court.

24 6130.

And afterward, on the 22nd day of April, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for the writ of error, which is in words and figures as follows, to wit:

To the honorable the chief justice of the State of Kansas:

Your petitioner, Mary E. Wood, respectfully shows that on the 4th day of April, 1890, the supreme court of the State of Kansas rendered a final judgment against your petitioner in a certain cause wherein the said Mary E. Wood was plaintiff in error and J. M. Beach was defendant in error, affirming in favor of the said J. M. Beach and against your petitioner a judgment in the district court of Allen county, Kansas, for the recovery and possession of certain land, to wit, the northeast ($\frac{1}{4}$) quarter of section one (1), town. 26, range 20 east, in Allen county, Kansas, as will appear by reference to the record and proceedings in said cause, and that said supreme court of the State of Kansas is the highest court in said State in which a decision of the said suit could be had, and your petitioner claims a right to remove said judgment and proceedings to the Supreme Court of the United States by a writ of error under section 709 of

the Revised Statutes of the United States, because in said suit your petitioner claims *his* rights to the land in dispute under and by virtue of the laws of Congress in relation to homestead and pre-emptions and the rulings and decisions of the proper officers thereunder, which rights have been decided against your petitioner in said supreme court of the State of Kansas in said cause; and your petitioner further alleges that the judgment aforesaid is against *his* rights, as shown by said record, guaranteed to *him* by section 5 of the act of Congress approved March 3rd, 1887 (entitled An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture
25 of unearned lands, and for other purposes); and your petitioner further shows that the issue and question involved in the trial of said cause are Federal in their nature and fall more particularly within the provision of the Federal courts and the proper officers of the Government of the United States.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States and for a citation.

WM. LAWRENCE &
A. L. ALLEN,
Attorneys for Petitioner.

Let the writ of error issue upon the petitioner, Mary E. Wood, entering into an undertaking to the said J. M. Beach in the sum of $600.00, conditioned as by law in such cases made and provided.

ALBERT H. HORTON,
Chief Justice.

6130. Mary E. Wood *vs.* J. M. Beach. Petition for writ of error.

Filed April 22nd, 1890.

C. J. BROWN,
Clerk Supreme Court.

26 6130.

And afterwards on the 23rd day of July, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas an appeal bond herein, which, with all of the endorsements thereon, is in the words and figures as follows, to wit:

Know all men by these presents that we, Mary E. Wood, J. H. Wood, Anton Bauer, N. L. Ard, Aron Hibbs, William Mattox, T. A. Wood, are held and firmly bound unto J. M. Beach in the full sum of six hundred dollars, to be paid to the said J. M. Beach, his attorneys, executors, administrators, or assigns; to which payment, well and fully to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of June, in the year of our Lord eighteen hundred and ninety.

Whereas lately, at a term of the supreme court of the State of Kansas, — between Mary E. Wood, plaintiff in error, and J. M. Beach,

defendant in error, judgment was rendered against the said Mary E. Wood, and the said Mary E. Wood having obtained a writ of error to the Supreme Court of the United States — filed a copy thereof in the clerk's office of the said supreme court of Kansas to reverse the judgment in the aforesaid suit, and a citation directed to the said J. M. Beach, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Mary E. Wood shall prosecute her writ of error to effect and answer all damages and costs if she fail to make good her plea, then the above obligation to be void: otherwise to remain in full force and effect.

MARY E. WOOD.
J. H. WOOD.
ANTON BAUER.
N. L. ARD.
his
ARON x HIBBS.
mark.
WM. M. MATTOX.
T. A. WOOD.

Witnessed:
A. BAUER.
J. H. WOOD.

27 The above and foregoing bond approved by me this 23rd day of July, 1890.

ALBERT H. HORTON,
Chief Justice of Kansas.

ELSMORE, KANSAS, *July* 1*st*, 1890.

Chief justice of the State of Kansas.

DEAR SIR: I am personally acquainted with the sureties of Mary E. Wood's bond, and do say the bond is perfectly good for $600 or a much greater amount. If you wish any other evidence, I give you the names of E. Rosenthal, of Humboldt, and First National Bank of Humboldt.

Yours most respectfully, W. D. COX.

ELSMORE, *July* 1, 1890.

This is to certify that I am surety on bond for Mary E. Wood *vs.* J. M. Beach. I have 6 head of horses, 25 head of cattle, 40 head of hogs, and 150 acres of growing crop; the stock is worth at least $1,000. There is no mortgage or lien of any kind on the stock or crop.

J. H. WOOD.

JULY 1ST, 1890.

I hereby certify I am one of the sureties on the bond of Mary E. Wood *vs.* J. M. Beach. I have 61 head of cattle, 9 head of horses,

40 head of hogs; total worth $1,500; 100 acres of growing crop; debts against me to the amount of $600; balance clear.

W. M. MATTOX.

6130. Mary E. Wood *vs.* J. M. Beach. Appeal bond.

Filed July 23, 1890.

C. J. BROWN,
Clerk Supreme Court.

28 6130.

And after-, on the 20th day of November, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a writ of error in the above-entitled cause, which is in the words and figures as follows, to wit:

6130.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the supreme court of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the supreme court of the State of Kansas, before you, between Mary E. Wood, plaintiff in error, and J. M. Beach, defendant in error, a manifest error hath happened, to the great damage of the said Mary E. Wood, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do *de*mand you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what *if* right and according to the laws and customs of the United States should be done.

The Seal of the Circuit Court of the United States, District of Kansas, 1862.

Witness the Honorable Melville Fuller, Chief Justice of the Supreme Court of the United States of America, this 20th day of November, A. D. 1890.

G. F. SHARITT, *Clerk.*

Allowed.
[Endorsed:] 6130.

29 6130.

And afterwards, on the 31st day of December, 1890, there was filed in the office of the clerk of the supreme court of the State of Kansas a citation in the above-entitled cause, the original of which, with the endorsements thereon, is in the words and figures as follows, to wit:

6130.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To Mary E. Wood or her attorney of record, L. W. Keplinger, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in the city of Washington, *of* the — day of ——, pursuant to the writ of error filed in the clerk's office of the supreme court of the State of Kansas in a certain action wherein Mary E. Wood is plaintiff in error and J. M. Beach is defendant in error, to show cause, if any there be, *and if* the judgment in said writ of error mentioned shall not be corrected and speedy justice should not be had in that behalf.

Witness the Hon. Albert H. Horton, chief justice of the State of Kansas, this 23d day of December, 1890.

ALBERT H. HORTON,
Chief Justice of Supreme Court of Kansas.

I hereby acknowledge receipt of copy of above this 31st of Dec., 1890.

L. W. KEPLINGER.
Att'y for Mary E. Wood.

30 In the Supreme Court of the State of Kansas.

I, C. J. Brown, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, correct, and complete transcript of all pleadings and papers filed and of all proceedings had in the above-entitled cause as the same remain on file and of record in my office.

Seal Supreme Court, State of Kansas.

Witness my hand and the seal of the supreme court of the State of Kansas, affixed hereto at my office, in the city of Topeka, this 18th day of March, 1891.

C. J. BROWN,
Clerk Supreme Court.

Endorsed on cover: Case No. 14,601 Kansas supreme court. No. 143. Mary E. Wood, pl'ff in error, vs. J. M. Beach. Filed April 27, 1891.